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In the Supreme Court of the United States

OCTOBER TERM, 1991

THE HONORABLE JACK BROOKS, PETITIONER,

v.

W. DOUGLAS WILLIAMS, ET AL., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MARCH 1992

QUESTION PRESENTED

Does a Member of Congress sued for civil damages for actions within the ambit of the Member's official duties, although not purely lawmaking-related in character, receive the same limited official immunity protection which is available to all other governmental officials?

PARTIES TO THE PROCEEDING

The parties to the proceeding are United States Representative Jack Brooks, Petitioner; and W. Douglas Williams and his wholly-owned company, Texas Dynamics, Inc., Respondents.

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Petitioner, the United States Representative for the Ninth District of Texas, through the General Counsel to the Clerk of the United States House of Representatives, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on October 31, 1991 in this proceeding.

OPINIONS BELOW

The opinion of the district court was not published, and is attached as Appendix A. The opinion of the Court of Appeals is reported at *Williams v. Brooks,* 945 F.2d 1322 (5th Cir. 1991), and is attached as Appendix B.

JURISDICTION

The judgment in the United States Court of Appeals for the Fifth Circuit was entered on October 31, 1991. That court denied a petition for rehearing and suggestion for rehearing en banc on December 13, 1991; the order is attached as Appendix C. This petition was filed within 90 days of that date in accordance with Rule 13.4 of the

Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 1, provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

STATEMENT OF THE CASE

1. The Honorable Jack Brooks has served as the United States Representative for the Ninth District of Texas since 1953, and as Chairman of the House Committee on the Judiciary since 1989. The opinions below, particularly the opinion of the Court of Appeals, fully describe the facts of the case, which have been assumed to be true as alleged in the complaint. In short, Congressman Brooks urged successfully and publicly to bar federal funding of a ten percent "influence" commission sought by the plaintiff. Plaintiff sued the Congressman for his discussion of this issue in an interview in his office on the Capitol Grounds.

"In 1983, the State of Texas established the Battleship Texas Advisory Board (Board) to promote the restoration of the Battleship Texas." App. B at 5a. Texas Parks and Wildlife Code Ann. § 22.252 (Vernon Supp. 1987) (Board's statutory authorization). Plaintiff Williams, who "works as a fund raiser in political affairs . . . contracted with the Board to raise money for the restoration of the battleship." *Id.* When Congress enacted funding for restoration, Williams claimed that he himself should receive a ten percent commission for his asserted influence over obtaining the appropriation.

> [O]n October 30, 1986, Congress enacted the Continuing Appropriations for Fiscal Year 1987 [Pub. L. No. 99-591, 100 Stat. 3341]. In part of this continuing resolution providing for defense appropriations, the law made $5,080,000 available for a grant to the Board. After the appropriations bill was

> passed, but before funds were disbursed under the grant, the Board terminated Williams' contract. Williams contended that his contract entitled him to compensation equivalent to ten percent of the federal appropriation.

App. B, at 6a.[1]

Williams' claim led Chairman Brooks, in his official capacity, to engage in immediate written consultations with the Secretary of the Navy, setting forth the Congressman's opinion:

> During the course of that controversy, in January 1987, Congressman Brooks wrote a letter to Secretary of the Navy John F. Lehman regarding the federal appropriation. The letter referred to Williams' claim for a share of the federal funds and stated that, in Congressman Brooks' opinion, it would "be against public policy—and possibly illegal as well—for Federal funds to be diverted to such use." Congressman Brooks requested a delay in administrative action before any disbursement of funds. A copy of the letter was sent to Williams, whose counsel sent his own letter in response. Secretary Lehman agreed that the appropriated sums should not be used for fund raising, and the grant was withdrawn until the issue could be resolved.

App. B. at 6a.

At the time, further administrative and legislative action were pending on the much-discussed issue of Williams' demand for a commission. The further legislative action soon proceeded all the way to enactment:

> [O]n March 5 . . . the House Subcommittee on Defense [Appropriations] with jurisdiction over the Battleship Texas grant, had a meeting regarding the fiscal year 1987 supplemental appropriations. On March 25, the House Appropriations Committee reported the Supplemental Appropriations Bill for

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[1] Title II's section regarding "Operation and Maintenance, Navy" stated: "*Provided further,* That of the funds appropriated herein, not to exceed $5,080,000 shall be available for a grant to the Battleship Texas Advisory Board of the State of Texas for the Restoration of the Battleship Texas." Pub. L. No. 99-591 100 Stat. 3341-86.

> Fiscal 1987 to the House. The bill contained language clarifying that the monies appropriated for the Battleship Texas were to be used only for restoration and not for remuneration of fundraising activities. The supplemental appropriations bill was signed into law on July 11, 1987, with the added provision that the grant would be made to the Texas Parks and Wildlife Department instead of the Board

App. B, at 7a.[2]

After Congressman Brooks commenced his official exchange with the Navy, and during the period of this legislative action, Representative Brooks stated his position on Williams' claims to a ten percent share of the federal funds in a public interview. As the district court noted, the "statements of Defendant Brooks were made in his government office in Washington and in his capacity as a federal official," by "the act of giving an interview to members of the media in his official capacity . . . ." App. A at 3 a. The plaintiff's complaint states:

> [O]n or about February 24, 1987, the Defendant, Jack Brooks, was interviewed in his Washington office by a representative of KTRK television, also known as Channel 13, which is located in Houston, Texas, and said interview related to the controversy which has arisen in connection with the restoration of the Battleship Texas. During said interview, which was videotaped or otherwise recorded by agents of KTRK television, the Defendant spoke the following words of and concerning the Plain-

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[2] As enacted, section 10 of the administrative provisions for Chapter II, concerning the Department of Defense, stated:

> SEC. 10, None of the funds appropriated for the Department of Defense in fiscal year 1987 are available *for remuneration of any individual or entity associated with fund raising* for the restoration of the Battleship Texas: *Provided*, That the grant for the restoration should be made to the Texas Parks and Wildlife Department vice the Battleship Texas Advisory Board of the State of Texas.

Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 399 (1987) (emphasis added).

> tiffs which in the context of said interview could only be understood to refer to Plaintiff Williams and his corporation. In this regard, Defendant Brooks stated that Plaintiff Williams was "an ordinary hustler" and/or "a small-time hustler." Defendant Brooks further stated that Plaintiff Williams' conduct was "illegal and immoral" and that "five and ten percenters" such as Plaintiff Williams "were put in jail under Eisenhower and that's where they ought to put them."

App. B at 6a–7a (quoting complaint).

Chairman Brooks' official statements occurred the same month as his written exchanges with Secretary Lehman. They also occurred only the week before the meeting of the House Subcommittee on Defense Appropriations, with jurisdiction over the Battleship Texas grant, for the fiscal year 1987 supplemental appropriations. 133 Cong. Rec. D214 (daily ed. Feb. 26, 1987) (announcing schedule). It was that meeting which led shortly to the reporting of the new legislative provision to the House,[3] and, after the remaining steps for the supplemental appropriations bill,[4] to the enactment of the pro-

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[3] On March 25, the House Appropriations Committee reported the Supplemental Appropriations Bill for Fiscal Year 1987, H.R. 1827, to the House. Its report, which contained a specific provision concerning the Battleship Texas controversy, states:

> *Battleship Texas:* The Committee has included bill language concerning the Battleship Texas grant made in the Department of Defense Appropriations Act for 1987. The language clarifies the original Congressional intent that these funds be used only for actual restoration of the ship, *and not for remuneration of fund raising activities.*

Supplemental Appropriations Bill, 1987, H.R. Rept. No. 28, 100th Cong., 1st Sess. 28 (1987) (emphasis added).

[4] In the Senate, the provision regarding the Battleship Texas controversy was adopted during consideration of the supplemental appropriation on the floor, on May 27, 1987, on an amendment offered by Senator Bentsen. The Senator described his amendment as imposing conditions "that none of the funds may be given for remuneration for fundraising activities for this project," because "[w]ithout those condi-

Continued

vision into law on July 11, 1987. A direct line thus connects Congressman Brooks' public explanations with the enactment of the provision of federal statutory law resolving the issue.

2. On February 22, 1988, only several days short of one year after Representative Brooks' interview, Williams commenced this suit with a complaint filed in the District Court of Harris County, Texas, 125th Judicial District, Cause No. 88-009231, alleging defamation by Congressman Brooks in the television interview. Because Representative Brooks spoke in conjunction with his official duties, the action was removed to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1442(a)(1) and (4), and docketed as Civil Action No. H-88-1632. On June 2, 1988, Congressman Brooks moved to dismiss the suit, based on his entitlement to official immunity under federal law.

After briefing and oral argument, the district court (Hittner, J.) denied the motion on March 16, 1990 in an unpublished opinion. The district court recognized that "[t]he alleged defamatory statements of Defendant Brooks were made in his government office in Washington and in his capacity as a federal official," App. A at 3a. Nevertheless, the district court refused to consider allowing Representative Brooks the official immunity that would be allowed to any other federal official for public explanations in such controversies, saying that while official immunity "protects a federal official from claims based

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tions, there is a possibility of a continuing dispute over the payment of Federal funds for remuneration of fund raising, something which I do not believe Congress wants or intended." 133 Cong. Rec. S7185 (daily ed. May 27, 1987). As Senator Bentsen noted, "[t]he House of Representatives has already adopted this clarifying language."

Because the House and Senate had both adopted the provision, nothing was needed in conference other than making its number conform to the renumbering of the bill. Making Supplemental Appropriations for the Fiscal Year ending September 30, 1987, H.R. Conf. Rept. 195, 100th Cong., 1st Sess. 33 (June 27, 1987) (description of amendment no. 75).

upon statements or actions within the 'outer perimeter' of his line of duty as a federal official. *Barr v. Mateo*, 360 U.S. 564, 575 (1959). . . . As it applies to legislative officials, however, absolute official immunity merely fulfills the mandate of the Speech or Debate Clause." App. A at 2a. In other words, since Congressman Brooks made his statements off the House floor, and Speech or Debate immunity did not apply, he would receive no immunity at all, not even the protection any other federal official would receive.

3. On appeal,[5] a panel of the Fifth Circuit issued two separate opinions. The majority opinion (Garwood and Barksdale, JJ.), expressed itself as largely agreeing with two of the Congressman's arguments. Congressman Brooks had argued that denial of official immunity " 'produces the self-contradicting result that the officials whom the Constitution most explicitly protect—Members of Congress—receive the least immunity. . . .' " App. B at 20a. The panel described this argument as "not without considerable force." App. B at 20a. Similarly, Congressman Brooks had asked "why the *Barr* [*v. Matteo*, 360 U.S. 564 (1959)] rationale—that if officials do not receive official immunity, they would hesitate to give public statements in their official capacities—would be any less true for legislative than for executive officials." App. B at 19a. This argument the panel described, too, as "not without considerable force." App. B at 20a. The panel even cited and noted the cases which "specifically held that congressmen are entitled to official immunity from suits for common law torts." App. B at 18a. However, the panel declined to follow these, deeming itself "powerless" under this Court's precedents "to expand official absolute immunity" of the kind available to all other federal officials, to apply to Congress. App. B, at 20a.

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[5] Denial of official immunity for Congressman Brooks was immediately appealable pursuant to the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

A separate concurring opinion by Judge Reavley expressed even further agreement with Congressman Brooks, all but calling for this Court to review the matter:

> I am compelled by the controlling authority to concur in this opinion; but I would hold, if free to do so, that official immunity from common law defamation liability extends to members of Congress when in an official capacity they comment on current legislative issues. *See,* Mikva, Circuit Judge, dissenting in *Chastain v. Sundquist,* 833 F.2d 311, 328 (D.C. Cir. 1987), *cert. denied,* 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 946 (1988).

App. B at 21a. A suggestion of rehearing en banc was denied on December 13, 1991. App. C at 22a.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS AN ISSUE OF SIGNIFICANT AND RECURRING CONCERN TO A COORDINATE BRANCH OF GOVERNMENT, REGARDING WHICH THREE MEMBERS OF THE CURRENT COURT HAVE PREVIOUSLY SUPPORTED SUPREME COURT REVIEW

For the second time in the past four years, a Member of the United States Congress comes before this Court seeking an answer to this question: whether a Member of Congress qualifies, like all other public officials, for the limited protection afforded to him in the performance of his official duties by the doctrine of official immunity. *See Chastain v. Sundquist,* 487 U.S. 1240 (1988) (White, Blackmun, and O'Connor, JJ., dissenting from denial of certiorari). This is an issue of significant and recurring concern to a coordinate Branch of government. While this case presents this issue in acute form, the need for a decision by this Court derives from previous judicial pronouncements, a previous vote of the House of Representatives requesting the grant of a writ of certiorari, historic policy evolution, and the sharp inconsistency that has developed in the law of official immunity.

Over the last two decades, this Court has sketched with some degree of detail a two-tiered description of the official duties of Members of Congress. The Court deems activities which constitute an integral part of the legislative process to be legislative actions which obtain the profound protection accorded by the textually explicit Speech or Debate Clause. U.S. Const. art. I, sec. 6, cl. 1. For such activities, no judicial questioning or "question[ing] in any other Place," *id.*, is permitted. Thus, such legislative actions cannot be the basis of a civil action seeking either monetary damages or injunctive relief. Moreover, such legislative actions cannot serve as the basis for "questioning" in the criminal context by means of grand jury inquiry or indictment, or in third-party discovery. *Gravel v. United States*, 408 U.S. 606 (1972); *Dennis v. Sparks*, 449 U.S. 24, 30 (1980).

While recognizing the broad impact of the Speech or Debate immunity for legislative actions, this Court has carefully enunciated that many of the official actions routinely engaged in by Members of Congress do not constitute core legislative functions and therefore are not protected by the Constitution's Speech or Debate Clause. Chairman Brooks has recognized the import of these holdings and has not sought to characterize his statements in this case as core legislative action protected by the Speech or Debate Clause. However, this Court has also recognized that Members engage in clearly "official" activities apart from those within the Speech or Debate Clause. *See, e.g., Gravel v. United States*, 408 U.S. 606, 625 (1972); *United States v. Brewster*, 408 U.S. 501, 512, 524 (1972).

The courts below recognized correctly the official nature of Chairman Brooks' activities in this case. In sum, as the Court of Appeals described, Representative Brooks spoke about the administrative and legislative controversy over plaintiff's claim for a commission of ten percent of a federal appropriation. Chairman Brooks spoke about this in the midst of active administrative and

legislative consideration of the issue. The Representative's speech culminated in the launching, a mere week after he spoke, of the legislative vehicle that ultimately carried into statutory law the provision against paying of the disputed claim from the prior appropriation. Few examples could occur of a statement more closely entwined within the official work of the Congress, or more akin to the type of explanations during public controversies for which all other officials receive the protection of official immunity. *See, e.g., Howard v. Lyons,* 360 U.S. 593 (1959) (official immunity for public letter to Congress regarding controversy over waste of public funds by plaintiff).

The judges on the Fifth Circuit panel acknowledged that affording Members of Congress the same protection given to all other public officials ranging from the local dog catcher to federal cabinet officers, and including many with legislative responsibilities, was logical. One panel member went so far, in his concurring opinion, as to state that, "if free to do so" he "would hold . . . that official immunity from common law defamation liability extends to members of Congress when in an official capacity they comment on current legislative issues." Appendix B, at 21a (Reavley, J., concurring). However, this judge did not perceive himself to be "free to do so," feeling compelled by this Court's prior opinions to a contrary result. The panel majority's opinion, having acknowledged the considerable force of the argument that Members of Congress should not receive less protection than any other public official, described this Court's earlier writings as leaving them "powerless" and having "foreclose[d]" this logical result. App. B at 20a, 16a. Contrary to these expressions, this Court has never taken away the official immunity of legislators, making it appropriate for a pronouncement on this important issue.

This same issue came to this Court once before within the last four years. In *Chastain v. Sundquist,* 833 F.2d 311 (D.C. Cir. 1987), *cert. denied,* 487 U.S. 1240 (1988), a panel of the District of Columbia Circuit had sharply di-

vided over this issue, in a defamation suit against Representative Don Sundquist for statements in a public controversy. The *Sundquist* panel majority decided, principally based on asserted policy considerations, that Members of Congress were the only public officials not protected by the official immunity doctrine. Current Chief Judge Mikva filed a pointed dissent, and a plurality of the Circuit voted to review the panel's decision en banc, which was not a sufficient vote for review.[6]

A petition for certiorari was filed, and during its pendency, the full House of Representatives, by a unanimous vote of 413-0, adopted H.R. Res. 446, 100th Cong. 2d Sess. introduced by then Majority Leader and present Speaker, Thomas S. Foley and Republican Leader Robert Michel.[7] That Resolution specifically requested the Supreme Court to grant certiorari and provide definitive guidance to the Congress and lower courts on this issue of importance to the Congress. Of course, the House of Representatives did not call upon the Court to reach any particular decision, but rather only to accept the case and proceed to decide the question in the manner the Court believed to be appropriate. The importance of the issue, underlined by the vote of the House of Representatives, persuaded three current Members of this Court, Justices White, Blackmun and O'Connor, to indicate that certiorari should be granted. *Chastain v. Sundquist,* 487 U.S. 1240 (1988). What the House of Representatives expressed in 1988 remains valid today, and this Court may take it into consideration regarding Chairman Brooks' Petition for Certiorari.

This recent history of judicial and Congressional statements reflects the high importance of providing official

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[6] The Circuit Court's vote for rehearing en banc was six judges in favor with five judges opposed. *Wayne Chastain v. Don Sundquist,* No. 86-5386 (D.C. Cir. filed Jan. 27, 1988). One member of the Court had previously announced his retirement and did not participate in the vote although he continued to be counted as a Judge in regular active service. Thus, the six to five vote represented a fifty percent plurality but not a majority vote of the Circuit.

[7] The resolution is reproduced in Appendix D.

immunity to officials in general, and the associated importance of clarifying the providing of that protection to members of the co-ordinate Legislative Branch. The doctrine of official immunity was developed by the courts in an effort to insure that a public official carries out his governmental responsibilities amid controversies, undeterred by the "apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages." *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). In recognition of the important and official governmental function of informing the American people, the courts have routinely protected, by application of the doctrine of official immunity, public officials sued for defamation for their public pronouncements. Governmental officials ranging from a NASA Center director, a Smithsonian department chairman, an Army commander, administrative law judges, a tax collector, a bank examiner, to an agency press officer have all received official immunity protection against defamation suits.[8]

In a case specifically concerning Congress, this Court described the purpose of official immunity thusly:

> The official immunity doctrine . . . confers immunity on Government officials of suitable rank for the reason that "officials of government should be free to exercise their duties unembarrassed by the

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[8] *Bush v. Lucas*, 462 U.S. 367, 371 (1983) (NASA center director); *Strothman v. Gefreh*, 739 F.2d 515 (10th Cir. 1984), *aff'd after remand*, 808 F.2d 1399 (10th Cir. 1987) (administrative law judges); *George v. Kay*, 632 F.2d 1103 (4th Cir. 1980) (postal inspector); *Expeditions Unlimited v. Smithsonian Institution*, 566 F.2d 289, 294 (D.C. Cir. 1977) (*en banc*), *cert. denied*, 438 U.S. 915 (1978) (Smithsonian department chairman); *Mandel v. Nouse*, 509 F.2d 1031 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975) (Army commander); *Sowders v. Damron*, 457 F.2d 1182 (10th Cir. 1972); *Molever v. Lindsey*, 411 F.2d 597 (6th Cir. 1969) (bank examiner); *David v. Cohen*, 407 F.2d 1268 (D.C. Cir. 1969) (tax collector); *Queen v. TVA*, 689 F.2d 80, 82 (6th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) (press officer). A Smithsonian department chairman, or a NASA center director, have far less need to inform the public about controversies than does a Member of Congress.

> fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Doe v. McMillan, 412 U.S. 306, 318–19 (1973) (quoting *Barr v. Matteo,* 360 U.S. 564 (1959)).[9] Writing in a case of official immunity for public statements during a Congressional controversy, Justice Black emphasized the important role that informing the public plays in a democracy. "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. . . . Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important. *Barr v. Matteo,* 360 U.S. at 577 (Black, J., concurring).

The Framers recognized the importance of protecting Members of Congress in giving exactly the kinds of official statement made by Representative Brooks in this case. Thomas Jefferson and James Madison were vigilant to protest an attempt to submit to intimidation a Member of the House of Representative for his official communications made off the floor of the House. *See* "Protest against interference of Judiciary between Representative and Constituent." 8 Works of Thomas Jefferson 322 (Fed. ed. 1904). Jefferson and Madison wrote their "Protest" in defense of Congressman Samuel Jordan Cabell, the Representative from the Virginia congressional district fortuitous enough to be home to both Madison and Jefferson.

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[9] While the provision of an immunity might result in an individual citizen being left without a remedy for an injury caused by the official action, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Barr v. Matteo,* 360 U.S. 564, 572 (1959) (quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949) (Hand, C.J.), *cert. denied,* 339 U.S. 949 (1950)).

Like Chairman Brooks here, Congressman Cabell was accused of committing a defamation, in Cabell's case criminal, in the course of explaining to his constituents the reasons for his opposition to a particular governmental action. Madison and Jefferson noted that "the people have professed the right of being governed by laws to which they have consented by representatives chosen by themselves immediately" and therefore:

> In order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, [and] full. . . .

United States v. Ford, 830 F.2d 596, 601 (6th Cir. 1987) (quoting Jefferson and Madison's "Protest").

Certainly, the public's interest in the free flow of communication regarding the official activity of the myriad of officials to whom the courts have provided protection for their official statements applies for the protecting of communication from their own elected representatives. The inconsistency of provision of official immunity protection for the statements of officials like prosecutors and judges that are made officially though not in the courtroom, but not providing official immunity for legislators, highlights the need for this Court's review. *See, e.g., Burns v. Reed,* 111 S.Ct. 1934 (1991) (for a prosecutor's official activity that does not come within absolute immunity, he receives qualified immunity). Otherwise, the approach of the court below produces the absurd result that the only public officials for whom an immunity was written into the text of the Constitution have more exposure than the legions of officials for whom the Framers did not believe in providing any specific textual protection.

Furthermore, the approach of the court below also contradicts the manner in which courts have treated other officials, such as prosecutors and judges, who receive a function specific absolute immunity for their core functions but also receive a generalized official immunity when engaging in official functions outside their core. Thus, judges receive absolute judicial immunity when judging, but also receive official immunity when making employment decisions even though those employment decision are deemed unworthy of judicial immunity. *Forrester v. White,* 484 U.S. 219 (1988). Similarly, prosecutors receive a derivative absolute immunity when prosecuting, but if they step outside the courthouse and communicate with the public by press conference or press release they receive a generalized official immunity and not the function-specific judicial immunity. *See, e.g., Burns v. Reed, supra.*

2. TO PRECLUDE THE APPLICATION OF OFFICIAL IMMUNITY TO THE OFFICIAL ACTIONS OF MEMBERS OF CONGRESS MISREADS THE LANGUAGE OF *DOE V. MC MILLAN* AND THE SILENCE OF *HUTCHINSON V. PROXMIRE*

This Court should grant the writ of certiorari to prevent a preclusion of the application of official immunity to official actions of Members of Congress. The Fifth Circuit excluded Members of Congress from the protections afforded by the doctrine of official immunity based on a misreading of this Court's pronouncements on the question. In *Doe v. McMillan* this Court expressly declared that "both before and after Barr [v. Matteo, 360 U.S. 564 (1959)], official immunity has been applicable to officials of the Legislative Branch." 412 U.S. 306, 319 n. 13 (1973). Unless this Court reviews the decision below, the misreadings of this Court's seminal opinions will deprive Congress of the seemingly clear and logical directive making "official immunity" be "applicable to officials of the Legislative Branch."

In the view of the Fifth Circuit panel, the language of one Supreme Court decision, *Doe v. McMillan,* and the si-

lence of another, *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), leaves the Courts of Appeals powerless to apply the doctrine of official immunity. Each of these opinions warrants separate discussion. In *Doe v. McMillan,* the suit claimed an invasion of privacy from the compilation, publication and distribution of a congressional committee report discussing District of Columbia students. Named defendants included Members of Congress serving on the congressional committee, the committee staff, officials serving Congress in the Government Printing Office, and officials of the District of Columbia government and school system.

The Court held that the Members of Congress and congressional staff were protected by the textual immunity provided by the Speech or Debate Clause of the Constitution for their actions in compiling and publishing the Committee report. *McMillan* deemed report compilation and publication, as within the ambit of legislative activity, to be protected by Speech or Debate. No Member of the Court disagreed with the holding that dismissal of the suit as to the Members and committee staff had been proper.

As to the officials and staff who had taken actions to publicize or distribute pronouncements, the opinion for the Court authored by Justice White narrowly reached its conclusion, to remand the question of Speech or Debate immunity for the Public Printer and the Superintendent of Documents to the lower courts for resolution. Dissenting opinions were authored by Chief Justice Burger, current Chief Justice Rehnquist (for himself, Chief Justice Burger, Justice Blackmun and Justice Stewart) and Justice Blackmun (for himself and Chief Justice Burger).[10]

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[10] Justice Douglas in a concurring opinion joined in by Justices Brennan and Marshall stated that "With respect to damages—that is, whether respondents, including the members of the District of Columbia Government if a valid claim is stated against them, are protected by the doctrine of official immunity as set forth in the opinion of the Court—I agree that it is a matter for the lower courts in the first instance." *Id.* at 331.

These four Members of the Court opined that publication and distribution, even though not on the floor of the Congress, of official statements should be covered by the Speech or Debate Clause and warned of the "intimations" in the Court's opinion that the Speech or Debate Clause would not cover public distribution. Justice Rehnquist's dissent noted that the "ultimate holding is apparently that the District Court must take evidence and determine for itself whether or not such publication in this case was within the "legitimate legislative needs of Congress." *Id.* at 339. If the lower courts found the distribution to be within the legislative needs of Congress, then Speech or Debate immunity would preclude the action against Government Printing Office personnel.

On remand, the Court of Appeals for the District of Columbia Circuit recognized that this Court's initial denial of Speech or Debate immunity had been quite limited. The court proceeded to dismiss the case against the legislative functionaries on the grounds of official immunity, the very same immunity denied to Congressman Brooks by the Fifth Circuit:

> The Supreme Court . . . ha[s] so far considered only whether the [legislative defendants] were protected by an absolute immunity under the Speech or Debate Clause. . . . We now consider, whether, in addition, these appellees were protected by a qualified immunity. . . . We conclude that public policy is served by a holding that the [legislative defendants] in the present case have available a qualified immunity for their official acts, even though they may exceed the protection of the absolute Speech or Debate Clause immunity.

Doe v. McMillan, 566 F.2d 713, 718–19 (D.C. Cir. 1977).

Justice White's opinion for the Court in *McMillan* contains a sentence quoted, and emphasized, by the Fifth Circuit in this case: that "[t]he scope of the inquiry [to determine the applicability of official immunity] becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same." App. B at

15a (quoting 93 S. Ct. at 2030). The Fifth Circuit misread this as foreclosing and precluding the application of official immunity to Members of Congress. Not only does this ignore both the key other language in the Court's opinion, and the actual outcome in the *McMillan* litigation, but it also fails to bear in mind that Justice White was writing at a time when the law differed in two very relevant respects.

First, *McMillan* preceded by nearly a decade this Court's seminal decisions on official immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In light of the law at that time, *McMillan* naturally states that "Because the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens, there is no ready-made answer as to whether the remaining federal respondents—the Public Printer and the Superintendent of Documents—should be accorded absolute immunity in this case." 412 U.S. at 320.

In light of *Harlow* and associated decisions, the Court has now articulated a clearly defined standard of official immunity. A public official engaged in discretionary functions within the outer perimeter of his official duties will only have to answer a civil action for monetary damages which alleges that he violated a clearly enunciated provision of constitutional or statutory law applicable to his conduct. *Harlow*, 412 U.S. at 818. Unlike the law at the time of *McMillan* in 1973, now the Supreme Court has established answers to such questions. The entire rationale of the rearticulation of immunity law in *Harlow* was to provide an objective standard for determining when the immunity would apply.

Second, the above-quoted sentence from *McMillan*, relied upon by the Fifth Circuit as precluding application of official immunity, was prefaced by critical language. "We do, however, write in the shadow of *Board of Re-*

gents of State Colleges v. Roth, 408 U.S. 564 (1972), and *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). . . ." *Doe v. McMillan,* 412 U.S. at 324. *Roth* and *Constantineau* suggested at the time, but did not hold, that governmental statements affecting reputation, without more (*i.e.,* without governmental action altering an individual's formal interests in property or liberty), might have specific constitutional due process implications. The *McMillan* Court's citation to *Roth* and *Constantineau* reemphasizes that the *McMillan* plaintiffs alleged Congressional defendants violated clearly established constitutional due process standards. If so, then the *McMillan* plaintiffs, under the *Harlow* formulation of official immunity, could indeed defeat a claim of official immunity. Thus, the statements in Justice White's *McMillan* opinion that the official immunity analysis "becomes equivalent" to Speech or Debate analysis, and "the answer is the same," were said in a specific context of due process constitutional claims where, under an appropriate form of analysis in the law at that time, official immunity might be unavailable for Congressional defendants against the specific claims. Official immunity was not universally ruled out for Members of Congress, but the statements addressed the claims in that case.[11]

However, in this case, there is simply no claim of constitutional transgression. Plaintiff Williams did not allege any due process or other constitutional violation, only defamation, a common law tort claim. Moreover, this Court has significantly clarified its holdings in *Roth* and *Constantineau. Paul v. Davis,* 424 U.S. 693 (1976) makes it clear that mere common law defamation by governmental officials did not amount to a constitutional tort, so official statements can receive protection by official immunity

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[11] In considering whether Justice White's language was intended to signal that official immunity was not available to Members of Congress, it might be kept in mind that Justice White is one of the three Justices who indicated that the Court should have granted certiorari in *Sundquist, supra.*

against such suits. Thus, it does double disservice to lift the *McMillan* statements from a context where official immunity for Members of Congress might have been considered unavailable against the particular claims, read those statements as universally depriving Members of Congress of official immunity, and apply them in this case, where official immunity clearly would be available against the particular claims.

As for the Fifth Circuit's revisiting of *Hutchinson v. Proxmire* at some length, App. B at 17a, this adds even more to the inappropriateness of the court of appeals' preclusion of Members of Congress from receiving the same official immunity as other officials. The result in *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), is not inconsistent with finding official immunity for Chairman Brooks. *Hutchinson* is inapposite. As the panel notes, "the *Proxmire* Court explicitly addressed only the Speech or Debate Clause, and not *Barr v. Matteo* official immunity," App. B at 17a (footnote omitted).

Congressman Brooks has consistently based his position on official immunity and not on the specialized immunity for Speech and Debate, since he did not make his remarks on the floor of Congress. The Representative did not rely upon Speech or Debate immunity in his motion to dismiss, in his argument in district court, or in his argument in the court of appeals. Despite the panel's recognition of the Congressman's position on this limited point, the panel unnecessarily revisits *Proxmire* at length, just to point out the absence of references in the *Proxmire* decision to the leading decision on official immunity in defamation cases, *Barr v. Matteo.*

The Fifth Circuit panel errs in considering it "likely explainable" (and "most unlikely" otherwise), App. B at 17a, that *Proxmire's* failure to discuss *Barr* official immunity was because the inapplicability of *Barr* official immunity was a foregone conclusion. Rather, it is more likely that *Barr,* which was never cited in Proxmire's seventy-six (76) page brief or in the Supreme Court's thirty-

six (36) page opinion, was not at issue.[12] This is more likely as *Hutchinson v. Proxmire* was not decided on the basis of the official immunity doctrine of *Barr* and *Howard v. Lyons*, 360 U.S. 593 (1959), but rather focused exclusively on legislators' specialized constitutional privilege under the Speech or Debate Clause, Art. I, § 6, cl. 1. *Hutchinson* simply confirms that the specialized Speech or Debate immunity did not apply to speeches off the Congressional floor. It said nothing to deprive Congressman Brooks of the limited official immunity he shares with executive and judicial officials. That limited official immunity differs sharply from the specialized legislative Speech or Debate immunity involved in *Hutchinson* (or, for that matter, from the specialized absolute immunities possessed by judges and prosecutors).

CONCLUSION

This case presents an issue of fundamental importance to Congress and the separation of powers. The Members of this Court all but granted certiorari on this issue when

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[12] The history of the litigation in *Hutchinson v. Proxmire* confirms this. *Barr v. Matteo* and the "official immunity" doctrine are not raised in the district court opinion, 431 F. Supp. 1311 (1977); the Seventh Circuit opinion, 579 F.2d 1027 (1978); the Petition for a Writ of Certiorari; the Brief in Opposition to Petition for Certiorari; the Brief for Petitioner; the Brief for Respondents; or the Petitioner's Reply Brief.

Barr official immunity was only raised by this office in its amicus brief filed on behalf of the Speaker, Majority and Minority Leaders of the House of Representatives. Brief of the Honorable Thomas P. O'Neill, Jr., Speaker, et al, as Amici Curiae, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (No. 78-960). This brief referred to *Barr* in support of the proposition that there has been judicial recognition of the "informing function" of Congress, *id.* at 9-10; in support of its argument for "finding that congressional-executive agency contacts are within the ambit of the Speech or Debate Clause," *id.* at 25-27; and in concluding that "[t]he follow-up calls can hardly be deemed improper in view of the holdings in *Barr v. Matteo, supra* and *Howard v. Lyons, supra* that executive officials are immune from suit in contacting Members of Congress about official acts in which they have an interest." *Id.* at 31.

it was most recently presented. This case is the appropriate one to reach and to resolve the issue. For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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MARCH 1992

APPENDIX A

In the United States District Court for the Southern District of Texas, Houston Division

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CIVIL ACTION NO. H-88-1632

W. DOUGLAS WILLIAMS, INDIVIDUALLY, AND DOING BUSINESS AS TEXAS DYNAMICS, INC., PLAINTIFF,

v.

THE HONORABLE JACK BROOKS, DEFENDANT.

ORDER

Pending before this Court is Defendant Honorable Jack Brooks' ("Brooks") Motion to Dismiss (Document #7).

Having considered said motion, the submissions of the parties, the arguments of counsel in open court on February 13, 1989, and the applicable law, the Court concludes that Defendant Brooks' Motion to Dismiss should be, and hereby is, DENIED.

DISMISSAL

Dismissal is proper only where it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Furthermore, in the context of dismissal based on an invocation of offi-

cial immunity by Defendant Brooks, a determination that Defendant cannot claim absolute immunity is sufficient to deny Defendant's Motion to Dismiss. *See Davis v. Passman,* 544 F.2d 865, 882 (5th Cir. 1977), *rev'd en banc on other grounds,* 571 F.2d 793 (1978), *rev'd,* 442 U.S. 228 (1979). Defendant Brooks has stipulated for purposes of this motion that the facts as pleaded by Plaintiff are true.

OFFICIAL IMMUNITY

The United States Constitution grants absolute immunity to Members of Congress with respect to any speech, debate, vote, report, or action done in session under the Speech or Debate Clause. U.S. Const. art. I, § 6. *See Scheuer v. Rhodes,* 416 U.S. 232, 239 (1974). In addition, there is a judicially created absolute immunity which protects a federal official from claims based upon statements or actions within the "outer perimeter" of his line of duty as a federal official. *Barr v. Mateo,* 360 U.S. 564, 575 (1959) (judicially created official immunity applies to executive officials). As it applies to legislative officials, however, absolute official immunity merely fulfills the mandate of the Speech or Debate Clause. *See Minton v. St. Bernard Parish School Bd.,* 803 F.2d 129, 134-35 (5th Cir. 1986). In practice, the scope of protection of legislative official immunity is equivalent to that of the Speech or Debate Clause. *See Doe v. McMillan,* 412 U.S. 306, 324 (1973) (inquiry into Speech or Debate Clause immunity and legislative official immunity is the same). Thus, the determination that either one is inapplicable means that a legislator's actions or statements are not absolutely immue.

Like the Speech or Debate Clause, absolute immunity extends to legislators only when they are legislating. *Passman,* 544 F.2d at 881. The Speech or Debate Clause does not insulate legislators "who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function." *McMillan,* 412 U.S. at 315-16. Newsletters and press releases are primarily means of informing those outside the legislative forum and are accordingly not entitled to the protection

of legislative immunity. *See Hutchinson v. Proxmire,* 443 U.S. 111, 132-33 (1979) (court is "unable to discern any conscious choice to grant immunity for defamatory statements scattered far and wide by mail, press, and the *electronic media*") (emphasis supplied).

The alleged defamatory statements of Defendant Brooks were made in his government office in Washington and in his capacity as a federal official, but the act of giving an interview to members of the media in his official capacity does not thereby automatically characterize his act as legislative in nature. *See Gravel v. United States,* 408 U.S. 606, 625 (1972) (private publication not essential to deliberations in Congress). For Defendant Brooks' statements to be protected, they must be an "integral part of the deliberative and communicative process, by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* At the time of Congressman Brooks' February 24, 1987, interview, however, there was no legislative action regarding the Battleship Texas pending before the House of Representatives. *See Summary of Facts,* Plaintiff's Supplemental Response to the Defendant's Motion to Dismiss. When acting outside the scope of his legislative duties, a member of Congress is not entitled to absolute immunity from civil liability for defamatory statements. *Chastain v. Sundquist,* 833 F.2d 311, 323 (D.C. Cir. 1987), *cert. denied,* 108 S. Ct. 2914 (1988).

Under the standards articulated by the United States Supreme Court and noted herein, the statements made by Congressman Brooks during his interview with the reporter from KTRK television are not within the legislative sphere protected by absolute immunity. According, there is sufficient cause to deny Defendant Brooks' Motion to Dismiss. *See Passman,* 544 F.2d at 882. It is therefore

ORDERED that Defendant's Motion to Dismiss be hereby DENIED.

SIGNED at Houston, Texas, on this 16 day of March, 1990.

DAVID HITTNER,
United States District Judge.

APPENDIX B

W. DOUGLAS WILLIAMS, PLAINTIFF-APPELLEE,

v.

HONORABLE JACK BROOKS, DEFENDANT-APPELLANT.

No. 90-2406.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Oct. 31, 1991.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

The sole issue in this interlocutory appeal is whether defendant-appellant The Honorable Jack Brooks (Congressman Brooks), as a Member of Congress, is absolutely immune under the doctrine of official immunity from a claim for defamation brought by a private citizen for comments made in a television interview. We hold that he is not, and we therefore affirm the district court's denial of his claim of official immunity.

FACTS AND PROCEEDINGS BELOW

In 1983, the State of Texas established the Battleship Texas Advisory Board (Board) to promote the restoration of the Battleship Texas. The Board sought private donations to fund the restoration. The plaintiff-appellee, W. Douglas Williams (Williams), works as a fund raiser in political affairs, both individually and through Texas Dynamics, Inc., a corporation of which he is the sole shareholder. Williams contracted with the Board to raise money for the restoration of the battleship.

In addition to the solicitation of private donations, those interested in the restoration effort sought public funds. Their efforts were successful; on October 30, 1986, Congress enacted the Continuing Appropriations for Fiscal Year 1987. In part of this continuing resolution providing for defense appropriations, the law made $5,080,000 available for a grant to the Board. After the appropriations bill was passed, but before funds were disbursed under the grant, the Board terminated Williams' contract. Williams contended that his contract entitled him to compensation equivalent to ten percent of the federal appropriation. A controversy developed over the compensation to be paid by the Board to Williams.

During the course of the controversy, in January 1987, Congressman Brooks wrote a letter to Secretary of the Navy John F. Lehman regarding the federal appropriation. The letter referred to Williams' claim for a share of the federal funds and stated that, in Congressman Brooks' opinion, it would "be against public policy—and possibly illegal as well—for Federal funds to be diverted to such use." Congressman Brooks requested a delay in administrative action before any disbursement of funds. A copy of the letter was sent to Williams, whose counsel sent his own letter in response. Secretary Lehman agreed that the appropriated sums should not be used for fund raising, and the grant was withdrawn until the issue could be resolved.

The allegedly defamatory statements were made by Congressman Brooks in a television interview at his Washington government office. Williams' complaint alleges that:

> "[O]n or about February 14, 1987, the Defendant, Jack Brooks, was interviewed in his Washington office by a representative of KTRK television, also known as channel 13, which is located in Houston, Texas, and said interview related to the controversy which has arisen in connection with the restoration of the Battleship Texas. During said interview, which was videotaped or otherwise recorded by

> agents of KTRK television, the Defendant spoke the following words of and concerning the Plaintiffs which in the context of said interview could only be understood to refer to Plaintiff Williams and his corporation. In this regard, Defendant Brooks stated that Plaintiff Williams was 'an ordinary hustler' and/or 'a small-time hustler.' Defendant Brooks further stated that Plaintiff Williams' conduct was 'illegal and immoral' and that 'five and ten percenters' such as Plaintiff Williams 'were put in jail under Eisenhower and that's where they ought to put them.' "[1]

Congressman Brooks contends that his position on the controversy regarding remuneration for Williams was being enacted into law at the time his statement was made to KTRK. Williams disagrees, and the trial court's order states that there was no legislative action pending at the time Congressman Brooks was interviewed. In any event, on March 5, the week after the KTRK broadcast, the House Subcommittee on Defense, with jurisdiction over the Battleship Texas grant, had a meeting regarding the fiscal year 1987 supplemental appropriations. On March 25, the House Appropriations Committee reported the Supplemental Appropriations Bill for Fiscal 1987 to the House. The bill contained language clarifying that the monies appropriated for the Battleship Texas were to be used only for restoration and not for remuneration of fund-raising activities. The supplemental appropriations bill was signed into law on July 11, 1987, with the added provision that the grant would be made to the Texas Parks and Wildlife Department instead of the Board.

[1] On February 22, 1988, Williams filed suit against Congressman Brooks in state court, alleging defamation based on Congressman Brooks' statements in the televi-

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[1] According to the brief of Congressman Brooks in this Court, he was actually referring to the 1949 War Assets Administration lobbying scandal, during the Truman presidency.

sion interview. The case was removed to federal court pursuant to 28 U.S.C. § 1442(a)(1) and (4).[2] On June 9,

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[2] Williams did not contest the removal below and does not contest it here. Nonetheless, because it is doubtful whether the federal district court would have had jurisdiction of the case had it been filed in that court, it would appear that the question of removal has not been waived by Williams. *See Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 1346-48, 31 L.Ed.2d 612 (1972); *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 117-18 (5th Cir. 1987) (en banc). 28 U.S.C. § 1442(a) provides in pertinent part:

"A civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office. . . .

"(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House."

Removal jurisdiction would appear not to lie under section 1442(a)(4), as Congressman Brooks was not acting "under an order of" the House of Representatives. Such removal is proper under section 1442(a)(1), however, as a congressman is an "officer of the United States" within the meaning of that subsection. *Hill Parents Ass'n v. Giaimo*, 287 F.Supp. 98, 99-100 (D.Conn.1968) (Timbers, J.) (Member of Congress; libel); *Preston v. Edmondson*, 263 F.Supp. 370, 372 (N.D.Okla.1967) (same). *See also Richards v. Harper*, 864 F.2d 85, 86 (9th Cir.1988) (Member of Congress is an officer of the United States within section 1442(a)(1)). As *Giaimo* and *Edmonson* reflect, the "color of . . . office" requirement has been broadly construed in cases involving a similar context. *See also Lepucki v. Van Wormer*, 765 F.2d 86, 88-89 (7th Cir.), *cert. denied*, 474 U.S. 827, 106 S.Ct. 86, 88 L.Ed.2d 71 (1985) (libel properly removed under section 1442(a)(1)); *Stein-Sapir v. Birdsell*, 673 F.2d 165 (6th Cir.1982) (same; libel and slander); *Poss v. Lieberman*, 299 F.2d 358, 359 (2d Cir.), *cert. denied*, 370 U.S. 944, 82 S.Ct. 1585, 8 L.Ed.2d 810 (1962) (same; libel); *Malone v. Longo*, 463 F.Supp. 139, 141-42 (E.D.N.Y.1979) (same; libel and slander); *Abrams v. Playle*, 414 F.Supp. 634, 636 (D.Guam 1976) (same; slander). While section 1442(a)(1) implicitly contains the related requirement of assertion of a colorable federal defense, *Mesa v. California*, 489 U.S. 121, 109 S.Ct. 959, 966, 103 L.Ed.2d 99 (1989), this is met in the instant case by Congressman Brooks' assertion of immunity. *See, e.g. Poss*, 299 F.2d at 359, and the other libel or slander cases cited above. We further observe that section 1442(a)(1) does not require that the case be one that could have initially been filed in federal court. *See IMFC Professional*

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1988, Congressman Brooks moved to dismiss the suit, claiming that he is entitled to official immunity under federal law. After briefing and oral argument, the district court in March 1990 denied the motion, and Congressman Brooks then perfected this pretrial appeal.

DISCUSSION

[2] Although the denial of a motion to dismiss is not a final judgment appealable under 28 U.S.C. § 1291, the denial of the instant motion, which raises a colorable claim of immunity, is appealable under the collateral order exception to the finality requirement of section 1291. *See Helstoski v. Meanor,* 442 U.S. 500, 99 S.Ct. 2445, 2449, 61 L.Ed.2d 30 (1979) (Speech or Debate Clause immunity); *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S.Ct. 2690, 2697, 73 L.Ed.2d 349 (1982) (presidential absolute immunity); *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 2814–15, 86 L.Ed.2d 411 (1985) (qualified immunity); *Williams v. Collins,* 728 F.2d 721, 724–26 (5th Cir. 1984) (absolute immunity under *Barr v. Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959)).

The district court's denial of a motion to dismiss on immunity grounds presents a question of law, reviewable *de novo. Walter v. Torres,* 917 F.2d 1379, 1383 (5th Cir. 1990).

The district court held that official immunity for federal legislators is coextensive with their protection under the Speech or Debate Clause. Congressman Brooks argues that congressmen are entitled to official immunity from suits for common law torts even when immunity would not be available under the Speech or Debate Clause.[3]

Services of Florida, Inc. v. Latin American Home Health, Inc., 676 F.2d 152, 156 (5th Cir.1982). *See also Christensen v. Ward,* 916 F.2d 1462, 1483 (10th Cir. 1990); *State of Florida v. Cohen,* 887 F.2d 1451, 1454 (11th Cir.1989); *Greenspun v. Schlindwein,* 574 F.Supp. 1038, 1041 (E.D.Pa.1983).

[3] Congressman Brooks' motion to dismiss was based solely on official immunity under federal law. However, on February 14, 1989, he filed a "Supplemental Brief With Respect to Recent Statutory Enactment,"

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calling attention to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRA), Public Law 100-694, which was signed into law November 18, 1988. This supplemental brief pointed out that FELRA amended the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671-80, and (1) extended FTCA coverage to the judicial and legislative branches, 28 U.S.C. § 2671; (2) provided that the FTCA would be the exclusive remedy for personal injury (and other) claims arising from the negligent or wrongful act or omission of a governmental employee acting within the scope of his office or employment (except for constitutional and certain statutory claims), 28 U.S.C. § 2679(b); (3) provided that upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time, the suit would be deemed one against the United States and it would be substituted as the party defendant, 28 U.S.C. § 2679(d); and (4) was applicable to cases pending as of the date of its enactment. Public Law 100-694 § 8(b) (set out as note under 28 U.S.C. § 2679).

The supplemental brief further noted that "discussions" had been initiated with the Department of Justice "with respect to the appropriate certification process to be followed in instances in which, like here, the federal official or employee is not part of the Executive Branch," and suggested that it would be appropriate to postpone oral argument on the motion to dismiss, which was then set for February 27, 1989, "[i]n order to permit such discussions to proceed." Alternatively, it was suggested that the court might want to hear argument on the immunity issue "and, if the case is not dismissed at that point, to set a schedule for briefing and decision of the statutory issue." In a February 23, 1989 response to this supplemental brief, Williams asked for additional time to brief the FELRA-FTCA issue. The district court then reset oral argument on the motion to dismiss for July 10, 1989.

At the July 10, 1989 hearing, Congressman Brooks' counsel informed the court that "[t]here has not been progress" in working out the certification matter with the Department of Justice, "so we have not been in the position to move to dismiss under the Federal Tort Claims Act and we are not raising that as a ground of dismissal." The district court's opinion denying the motion to dismiss did not advert to the FTCA or FELRA, and neither of the parties has adverted to it in the present appeal. Consequently, we express no opinion regarding it.

The record contains no indication that the Attorney General has made the scope of office or employment certification provided for in section 2679(d). Under section 2679(d)(3), if the Attorney General refuses to make such certification "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment" and if the court

Continued

Speech or Debate Clause Immunity

The Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." The clause has been interpreted to protect only "purely legislative activities." *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 2537, 33 L.Ed.2d 507 (1972) (" 'news letters' to constituents, news releases, and speeches delivered outside the Congress . . . are political in nature rather than legislative"). In *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), the plaintiff sued a member of Congress for making allegedly defamatory statements in a widely distributed press release. The Supreme Court held that the Speech or Debate Clause did not protect the issuance of the press release because "the transmittal of . . . information by individual Members in order to inform the public . . . is not a part of the legislative function or the deliberations that make up the legislative process." 99 S.Ct. at 2687. Congressman Brooks concedes that controlling Supreme Court precedent precludes a defense of Speech or Debate Clause immunity to this lawsuit.

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so certifies the action shall then become one against the United States and it shall be substituted as the party defendant (no such petition or certification is reflected in the record here). Upon substitution of the United States, the suit proceeds as other suits under the FTCA "subject to the limitations and exceptions applicable to those actions," section 2679(d)(4), and, among other things, "the United States shall be entitled to assert any defense based upon judicial or legislative immunity which would otherwise have been available to the employee . . . as well as any other defenses to which the United States is entitled." 28 U.S.C. § 2674. Under 28 U.S.C. § 2680(h) the provisions of the FTCA "shall not apply to— . . . (h) Any claim arising out of . . . libel, slander. . . ." However, in *United States v. Smith*, —— U.S. ——, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991), a suit against a governmental employee for course of employment negligence where the injury arose in a foreign country and was hence exempted from the FTCA by section 2680(k), the Court held that the FELRA nevertheless authorized substitution of the United States as the sole defendant, and subsequent dismissal of the suit on the basis of section 2680(k).

Official Immunity

[3] The judicially-created doctrine of official immunity protects federal officials from civil suits arising out of actions taken in the performance of their official duties and responsibilities. In *Barr v. Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), the Supreme Court held that the acting director of the Office of Rent Stabilization was immune from a defamation action because his press statements were "within the outer perimeter of [his] line of duty." 79 S.Ct. at 1341. The Court reasoned that

> "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of th[eir] duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.* at 1339.

[4] Although the doctrine of official immunity provides only a qualified immunity where constitutional torts are alleged, *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982), it provides "absolute immunity from suits [for torts] at common law." *Id.* 102 S.Ct. at 2732-33; *Claus v. Gyorkey,* 674 F.2d 427, 431 (5th Cir. 1982) ("Absent an allegation of a tort of constitutional magnitude, federal officials are entitled to absolute immunity for ordinary torts committed within the scope of their jobs").

[5, 6] A variety of federal and local officials are protected by the doctrine of official immunity.[4] Relying primari-

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[4] *E.g., Harlow,* 102 S.Ct. at 2732 (senior Presidential advisors); *United States v. Burzynski Cancer Research Institute,* 819 F.2d 1301 (5th Cir.1987), *cert. denied sub nom. Wolin v. United States,* 484 U.S. 1065, 108 S.Ct. 1026, 98 L.Ed.2d 990 (1988) (Food & Drug Administration employee); *Williamson v. United States Dep't of Agriculture,* 815 F.2d 368 (5th Cir.1987) (Farmers Home Administration officials); *Palermo v. Rorex,* 806 F.2d 1266 (5th Cir.), *cert. denied,* 484 U.S. 819, 108

Continued

ly upon *Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973), and *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 134-135 (5th Cir.1986), the district court held that in the case of legislative officials, "absolute official immunity merely fulfills the mandate of the Speech or Debate Clause," and, "[i]n practice, the scope of protection of legislative official immunity is equivalent to that of the Speech or Debate Clause." We agree with the district court's reading of these precedents.

In *McMillan*, the parents of District of Columbia school children sought damages and declaratory and injunctive relief for invasion of privacy that they claimed resulted from public dissemination of a congressional committee report assessing the state of the District of Columbia school system. The report included copies of failing test papers, lists of absences, and documents relating to disciplinary problems, in each instance identifying the students involved by name. The defendants included the members of the committee, the committee staff, the Superintendent of Documents, and the Public Printer. The district court dismissed the action against the individual defendants on the ground that the conduct complained of was absolutely privileged. A divided panel of the District of Columbia Circuit affirmed, concluding that these defendants were immune from the liability asserted against them because of the Speech or Debate Clause and the doctrine of official immunity as recognized in *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959).

S.Ct. 77, 98 L.Ed.2d 40 (1987) (IRS agent); *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 135 (5th Cir.1986) (school board members; "[w]hen an official possessing legislative responsibilities engages in official activities," he has the *qualified* immunity "grounded in good faith that is bestowed upon other government officials"); *Williams v. Collins*, 728 F.2d 721 (5th Cir.1984) (Army Corps of Engineers investigators); *Allred v. Svarczkopf*, 573 F.2d 1146 (10th Cir.1978) (dog catcher); *Jones v. Diamond*, 519 F.2d 1090, 1100-01 (5th Cir. 1975) (county board members).

The Supreme Court agreed that the claims against the congressmen and the committee staff were barred under the Speech or Debate Clause. Introducing material at committee hearings, referring the report to the Speaker of the House, and voting for publication of the report were "legislative acts," and, as such, were immune from suit. The Court explained that "a public report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries." 93 S.Ct. at 2024. The Court declined to examine the appropriateness or usefulness of the information that was published.

The Supreme Court went on to note, however, that "everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause." 93 S.Ct. at 2025. As the Court explained:

> " '[T]he Clause has not been extended beyond the legislative sphere,' and '[l]egislative acts are not all-encompassing.' *Gravel v. United States* [408 U.S. 606] 92 S.Ct. 2614, 2627 [33 L.Ed.2d 583] (1972). Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity.' *Id; United States v. Johnson* [383 U.S. 169] 86 S.Ct. 749 [15 L.Ed.2d 681] (1966). Nor does the Speech or Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process. *Gravel v. United States, supra.*" 93 S.Ct. at 2025 (citation form modified).

With respect to the claims of the Public Printer and the Superintendent of Documents for immunity under the Speech or Debate Clause, the Supreme Court framed the question as follows: "[W]hether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of in-

dividuals." 93 S.Ct. at 2025. The Court answered the question in the negative:

> "A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process 'by which members participate in committee and House proceedings.' By the same token, others, such as the Superintendent of Documents or the Public Printer or legislative personnel, who participate in distribution of actionable material beyond the reasonable bounds of the legislative task, enjoy no Speech or Debate Clause immunity." *Id.* at 2025–26 (citation and footnote omitted).

The Court continued: "Thus, we cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be." *Id.* at 2026.

The Supreme Court reached precisely the same conclusion with respect to the official immunity doctrine. The Court explained its resolution as follows:

> "We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. *The scope of the inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same.* The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the 'sphere of legitimate legislative activity,' they enjoy no special immunity *from local*

> *laws* protecting the good name or the reputation of the ordinary citizen." *Id.* at 2030 (emphasis added and citations omitted).

Although the Court's opinion in *McMillan* appears to us to foreclose Congressman Brooks' official immunity argument, we will proceed to discuss some of the other arguments and authorities raised by the parties.[5]

Congressman Brooks points out that on remand in *McMillan,* the D.C. Circuit held that the Public Printer and the Superintendent of Documents were entitled to "a qualified immunity for their official acts, even though they may exceed the protection of the absolute Speech or Debate Clause immunity." *Doe v. McMillan,* 566 F.2d 713, 719 (D.C.Cir.1977), *cert. denied,* 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 59 (1978). The D.C. Circuit allowed qualified immunity because those defendants had acted in good faith and "pursuant to statutory direction or congressional orders that they could have reasonably believed were valid." *Id.* This is not true in the case *sub judice,* and in any event, Congressman Brooks has not sought to invoke qualified immunity, and we have no occasion to, and do not, make any determination as to whether or not it is available.[6]

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[5] We recognize that the concurring opinion of Justice Douglas in *McMillan* appears to afford greater protection to members of the legislative branch under official immunity and the Speech or Debate Clause than does Justice White's opinion for the Court, and that it perhaps arguably reads the Court's opinion differently than we do. Nonetheless, because Justice White's opinion attracted a majority of the Court and Justice Douglas' opinion only three votes, we are bound by the majority opinion notwithstanding the fact that Justice Douglas and the two other justices who joined his opinion also joined the Court's opinion, which otherwise would not have commanded a majority of the Court.

[6] Congressman Brooks also relies on the statement in a footnote in *McMillan* that "[b]oth before and after *Barr,* official immunity has been held applicable to officials of the Legislative Branch." *Id.* 93 S.Ct. at 2028 n. 13. We do not hold that official immunity is not applicable to Congressmen, but we merely hold that the scope of its protection is coextensive with that of the Speech or Debate Clause.

Moreover, the result in *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), appears inconsistent with finding absolute immunity for Congressman Brooks here. *Proxmire* was a state law defamation suit, and the Supreme Court in substance concluded that federal law did not provide absolute immunity to Senator Proxmire. While the *Proxmire* Court explicitly addressed only the Speech or Debate Clause,[7] and not *Barr v. Matteo* official immunity, it seems most unlikely that it would have reversed the judgments below in favor of Senator Proxmire had official immunity been available. Certainly the facts in *Proxmire* were as favorable to a claim of official immunity as are those here. The failure to discuss that theory in *Proxmire* is likely explainable by the fact that the Court there explicitly held the complained of publications beyond the scope of the protection of the Speech or Debate Clause, and had already held in *McMillan* that in the defamations context official immunity of members of Congress was no broader than that afforded by the Speech or Debate Clause.

Congressman Brooks further contends that this Circuit has recognized that official immunity also covers congressmen. He cites the following language from *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *reh'g en banc granted and opinion vacated*, 553 F.2d 506 (1977) *rev'd on other grounds*, 571 F.2d 793 (1978) (en banc), *rev'd*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), an action against United States Congressman Passman, alleging that he violated the Fifth Amendment by discharging a female staff member because of her sex: "The inapplicability of Speech or Debate protection does not foreclose [a] Representative [ ] from asserting the same qualified immunity available to other government officials." *Id.* at 881 (cita-

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[7] The Court also rejected the claim that the plaintiff was any kind of a public figure, with the result that Senator Proxmire was not entitled to the protection of the "actual malice" rule of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

tions and footnote omitted). However, the original panel opinion in *Passman* went on to state:

> *"The inapplicability of speech or debate protection does, however, foreclose Representative Passman from asserting an absolute official immunity.* . . . Speech or Debate protection is coextensive with *the need* to afford members of Congress absolute immunity. Absolute immunity extends only to certain key government officials, and then only when they are governing. It extends to prosecutors when they are prosecuting, to judges when they are judging, and to legislators when they are legislating. As indicated, however, legislators are not legislating when they dismiss staff members. For the same reasons that the speech or debate clause does not extend to staff dismissals, Representative Passman cannot invoke absolute immunity." 544 F.2d at 881 (citations omitted) (emphasis added).

In any event, because the panel opinion in *Passman* was vacated on the granting of rehearing en banc and the immunity question was never addressed by the en banc court or by the Supreme Court, it is not binding.

Congressman Brooks states that the courts of other circuits have routinely applied the doctrine of official immunity to legislators. Nonetheless, only two of the cases cited specifically held that congressmen are entitled to official immunity from suits for common law torts. *See Adams v. American Bar Ass'n,* 400 F.Supp. 219, 226 (E.D.Pa. 1975) (cabinet officers, congressmen, and other federal officials entitled to *Barr* official immunity); *Dunlap v. Wahlstrom,* Civ. Action No. 82-184 (E.D.Ky. July 6, 1983) *aff'd,* 738 F.2d 438 (6th Cir.1984) (unpublished) (congressman and caseworker entitled to official immunity). The other cited cases involve either local officials, qualified immunity, or Speech or Debate Clause immunity.[8]

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[8] One of the cases cited by Congressman Brooks indicates that official immunity affords no greater protection to legislators than the Speech or Debate Clause. *Benford v. American Broadcasting Cos., Inc.,*

Continued

A case directly on point and discussed extensively by the parties is *Chastain* v. *Sundquist*. 833 F.2d 311 (D.C.Cir. 1987), *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 946 (1988). In that case, the panel majority concluded that "members of Congress . . . cannot claim immunity from defamatory statements unprotected by the Speech or Debate Clause." 833 F.2d at 316. The majority and dissenting opinions in *Sundquist* contain a very thorough discussion of the policy considerations, as well as the law, on this issue.

Congressman Brooks would distinguish *Sundquist* on the ground that it dealt with a legislator who spoke to the press about a dispute between a local legal aid society and a local juvenile court, which was not the subject of federal legislation, in contrast to his statements about Williams' claim for a commission, which pertained to an issue arising from recently enacted appropriations, and about which the House was developing further legislation. Congressman Brooks also contends that *Sundquist* was incorrectly decided because: (1) the panel majority misread the Supreme Court cases, relying on irrelevant Speech or Debate Clause discussions; and (2) *Sundquist* does not explain why the *Barr* rationale—that if officials do not receive official immunity, they would hesitate to give public statements in their official capacities—would be any less true for legislative than for executive officials. Congressman Brooks also points out that, on May 12, 1988, the House of Representatives, by a vote of 413-0, adopted a resolution condemning the *Sundquist* decision "because of its impact on the necessary and proper functioning of the House of Representatives as a coordinate branch of government and as the elected representatives of the American people." H.R.Res. 446, 100th Cong., 2d Sess. Finally, he contends that *Sundquist's* conclusion

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502 F.Supp. 1148, 1158 (D.Md. 1980) ("Absolute official immunity, when applied to the legislative branch, is at most coextensive with the absolute protection afforded by the Speech or Debate Clause").

that congressmen are limited to Speech or Debate immunity under the Constitution

> "produces the self-contradicting result that the officials whom the Constitution most explicitly protects—Members of Congress—receive the least immunity precisely because of that explicit protection, while other Branches—given no textual protection from lawsuit—receive the most immunity."

At least some of these arguments, particularly the latter and that concerning the *Barr* rationale, are not without considerable force. Nonetheless, we ultimately conclude that *Sundquist* properly resolved the immunity question in that case and is not distinguishable from the case before us. To hold that any statements conceivably within the "informing function" of members of Congress are absolutely immune from suit for defamation would almost wholly exempt senators and representatives from state defamation laws, and arguably in that respect expand the Speech or Debate Clause. We are in any event powerless under *McMillan* to expand official absolute immunity as Congressman Brooks requests. We also observe that members of the legislative branch, unlike members of the other coordinate branches of the federal government, have the unique power to pass a law giving themselves immunity from suit. Accordingly, it may be appropriate that any grant to them of more expansive absolute immunity than that already written into the Constitution come about by legislation rather than by judicial decision.[9]

CONCLUSION

For the foregoing reasons, the judgment of the district court is

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[9] The FELRA may be such a statute (see note 3 *supra*). Whether, or in what circumstances, such a grant of immunity could constitutionally override state defamation law is perhaps another question. But if there would be any constitutional problem with such legislation, then we must also assume that judge-made federal law would be subject to essentially the same limitations.

AFFIRMED.

REAVLEY, Circuit Judge, concurring.

I am compelled by the controlling authority to concur in this opinion; but I would hold, if free to do so, that official immunity from common law defamation liability extends to members of Congress when in an official capacity they comment on current legislative issues. *See* Mikva, Circuit Judge, dissenting in *Chastain v. Sundquist*, 833 F.2d 311, 328 (D.C.Cir.1987); *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 946 (1988).

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 90-2406

W. DOUGLAS WILLIAMS, PLAINTIFF-APPELLEE,

v.

HONORABLE JACK BROOKS, DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10-31-91, 5 Cir., 198 , F.2d)

(December 13, 1991)

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc in DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

members of the Court and a Majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

WATT GARWOOD,
United States Circuit Judge.

APPENDIX D

H. Res. 446

In the House of Representatives, U.S.,

May 12, 1988.

Whereas, consistent with the Constitution and the history of parliamentary bodies, the Members of the United States House of Representatives have always considered it to be an integral part of the official responsibilities of Members of Congress to inform the citizens they represent and the agencies of government regarding issues of public importance;

Whereas, the judiciary of the United States has in a long series of decisions established the doctrine of official immunity pursuant to which all public officials are provided certain protections from civil liability when engaged in the good faith performance of their official functions:

Whereas, in 1985 Representative Don Sundquist, a Member of this House, communicated with the Attorney General of the United States, the Federal Legal Services Corporation, and the citizens of the congressional district which he represents, informing them of an ongoing issue of public importance, a controversy relating to the expenditure of federal funds by the Memphis Area Legal Services in that federally funded organization's continuing dispute with the State of Tennessee's judicial branch;

Whereas, Wayne Chastain an attorney with the Memphis Area Legal Services filed suit against Representative Sundquist seeking in excess of one million dollars in personal damages based on Representative Sundquist's offi-

cial communications with the Attorney General of the United States, the Federal Legal Services Corporation, and the citizens of Tennessee;

Whereas, the United States District Court for the District of Columbia dismissed the suit, holding that Representative Sundquist's actions were official and that for the good faith performance of their official duties Members of Congress, like all other public officials, are protected from civil liability;

Whereas, on November 6, 1987, a divided panel of the United States Court of Appeals for the District of Columbia Circuit, departed from the precedent of that Court and the Supreme Court and reversed the ruling of the District Court holding that the doctrine of official immunity, which provides certain protections from civil liability to all public officials engaged in the good faith performance of their official duties, was not applicable to the official actions of a Member of Congress;

Whereas, despite the expressed desire of a majority of the participating judges of the court of Appeals for the District of Columbia Circuit to review the decision of the panel's majority by rehearing the case en banc, the en banc Court of Appeals declined to rehear the case;

Whereas, Representative Sundquist, through the Office of General Counsel to the Clerk of the House, is presently seeking a writ of certiorari from the Supreme Court of the United States;

Whereas, the decision of the divided panel of the Court of Appeals raises the most serious concerns for the doctrine of separation of powers provided in the Constitution and for the ancient and historic rights and privileges of the House; and

Whereas, the decision of the divided panel of the Court of Appeals, if left standing, will have an adverse effect on the performance of important official duties by Members of the House and will deprive citizens of an irreplaceable source of information about the functioning of their government: Now, therefore, be it

Resolved, That the House of Representatives considers the informing of citizens and executive branch agencies on matters of public importance to be a part of the official duties of a Member of the House; and be it further

Resolved, That the House of Representatives considers it to be appropriate that Members of the House engaged in the performance of their official duties will be treated by the Courts with the same respect and protection presently afforded by the Courts to all other public officials; and be it further

Resolved, That the House of Representatives views with deep concern the decision of the divided panel of the Court of Appeals of the District of Columbia Circuit in the case of Wayne Chastain v. The Honorable Don Sundquist because of its impact on the necessary and proper functioning of the House of Representatives as a coordinate branch of government and as the elected representatives of the American people; and be it further

Resolved, That the House of Representatives respectfully requests the Supreme Court of the United States to grant a writ of certiorari, so that it may review this matter, and reach a just result; and be it further

Resolved, That the Clerk of the House shall forthwith transmit a certified copy of this resolution to the Honorable Clerk of the Supreme Court.

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91-1446

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(2)

NO. 91-

In the Supreme Court of the United States

OCTOBER TERM, 1991

THE HONORABLE JACK BROOKS, PETITIONER,

v.

W. DOUGLAS WILLIAMS, ET AL., RESPONDENTS

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT
OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Attorney for W. Douglas Williams and Texas Dynamics, Inc., Respondents

APRIL 1992

QUESTION PRESENTED

Is the doctrine of absolute official immunity broader than, or is it coextensive with, Speech and Debate Clause immunity against claims of defamation for comments made in a television interview by a member of Congress?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

The Honorable Jack Brooks, Petitioner; and

W. (Weldon) Douglas Williams and Texas Dynamics, Inc., a Texas corporation in which Williams is the only shareholder, Respondents.

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In the
Supreme Court of the United States

OCTOBER TERM, 1991

NO. 91-

THE HONORABLE JACK BROOKS, PETITIONER,

v.

W. DOUGLAS WILLIAMS, ET AL., RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Respondents, W. Douglas Williams and Texas Dynamics, by and through their attorney, respectfully pray that this Honorable Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this proceeding entered on October 31, 1991.

OPINIONS BELOW

The opinion of the district court was not published, and is attached as Appendix A. The opinion of the Court of Appeals is reported at *Williams v. Brooks,* 945 F.2d 1322 (5th Cir. 1991), and is attached as Appendix B.

JURISDICTION

Respondents adopt Petitioner's statement.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, §1, provides "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article 1, §6, provides "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Article 1, §8, provides, in part, "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excise, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes;

* * * * *

To make all Laws which shall be necessary and proper

for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The entire text of Article I § 8 is reproduced as Appendix C

STATEMENT OF THE CASE

Although the opinion of the Fifth Circuit fully describes the facts of the case, Respondents believe a partial restatement is necessary where Petitioner has overstated the facts and where Petitioner has presented certain statements as facts which Respondents believe are merely conclusions.

Respondents, W. Douglas Williams and Texas Dynamics, Inc., had a contract with the Battleship Texas Advisory Board to raise money to restore the sixty-year-old Battleship Texas, which is berthed at a state park in Harris County, Texas. App. B, 5a. Williams' compensation was to be ten percent of the funds raised. App. B, 6a.

Williams raised money from private sources and also successfully lobbied for passage of a Congressional appropriation of $5,080,000 for restoration of the ship. The funds were to be distributed as a grant from the U.S. Navy. App. B, 6a.

Before the Navy funds were disbursed, the Board terminated the Williams/Texas Dynamics contract. Williams contended that the contract entitled them a fee of $508,000, ten percent of the grant. App. B, 6a. Respondents disagree with Petitioner's assertions (page 2 of its brief) that Williams sought an "influence" commission.

Congressman Brooks became involved in the dispute. In January of 1987, he wrote Secretary of the Navy, John

F. Lehman saying, "in my opinion, it would certainly be against public policy—and possibly illegal as well—for Federal funds to be diverted to such use" and requested that the Navy not proceed with the distribution of any funds. The grant was withdrawn. App. B, 6a. Brooks' letter to Secretary Lehman is not a part of Williams complaint. App. B, 6-7a.

Soon after the grant was withdrawn, public interest and concern was aroused because it appeared that there would be no money forthcoming to restore the Battleship.

On February 24, 1987, Petitioner, Congressman Jack Brooks, was interviewed in his Washington office by KTRK television (Channel 13) of Houston, Texas. In the interview, Brooks stated that the person concerned (who could only be understood to be Williams) was "an ordinary hustler" and/or "a small-time hustler," that Williams' conduct was "illegal and immoral" and that "five and ten percenters" such as Williams "were put in jail under Eisenhower and that's where they ought to put them." App. B, 6-7a. The statements contained in the televised interview are the only complaint in this suit.

On March 5, 1987, more than a week after this interview with Brooks was broadcast, the House Subcommittee on Defense met to consider the fiscal year 1987 supplemental appropriation. App. B, 7a.

On March 25, 1987, the House Appropriations Committee reported the Supplemental Appropriations Bill for Fiscal 1987 which provided that the Navy funds would be used only for actual restoration of the ship, and not for remuneration of fund raising activities." App. B, 7a.

The Supplemental Appropriations Bill was signed into law on July 11, 1987. The grant funds were finally distributed and restoration of the Battleship is now complete.

Representative Brooks has claimed throughout this litigation that the foregoing sequence of events constitutes pending administrative and legislative action at the time his statement was made to Channel 13. Petitioner's Brief pp. 3, 6, 9-10, App. B, 7a. However, the trial Court specifically found that there was no legislation pending at the time Brooks was interviewed. App. A, 3a.

In addition to overstating the facts of the case, Petitioner's description of the Fifth Circuit opinion is quoted so out of context that it rises to the level of inaccuracy.

Petitioners' brief states on page 7, "The panel even cited and noted the cases which specifically held that congressmen are entitled to official immunity from suits for common law torts. App. B at 18a. However, the panel declined to follow these..." In sharp contrast to Petitioner's optimistic description, the opinion says:

> Congressman Brooks states that the courts of other circuits have routinely applied the doctrine of official immunity to legislators. Nonetheless, only two of the cases cited specifically held that congressmen are entitled to official immunity from suits for common law torts. See *Adams v. American Bar Ass'n*, 400 F.Supp. 219, 226 (E.D.Pa. 1975) (cabinet officers, congressmen, and other federal officials entitled to *Barr* official immunity); *Dunlap v. Wahlstrom*, Civ. Action No. 82-184 (ED.Ky. July 6, 1983) aff'd, 738 F.2d 438 (6th Cir.1984) (unpublished) (congressmen and case-worker entitled to official immunity). The other cited cases involve either local officials, qualified immunity, or Speech or Debate Clause immunity. (Citations in original, footnote omitted.) App. B at 18a.

SUMMARY OF ARGUMENT

If this Court were to decide to review the issue of whether "official" immunity should protect legislators for a broader range of activities than "Speech and Debate immunity" this case is an unsuitable vehicle for such review because this Court would be required to review two bodies of well developed law—its definition of legislative duties and its requirement that the immunized activity be in furtherance of, or arising from the duties of the official.

Congressman Brooks claims he is entitled to the same absolute immunity created by this Court in *Barr v. Matteo* [1] "to shield public officials from undue interference with their duties and from potentially disabling threats of liability" [2]

Neither the Fifth Circuit nor the District Court have disagreed with that concept. These Courts applied long standing judicial definitions of legislative duties and held that "official immunity" has the same scope as "Speech and Debate Clause" immunity.[3]

It is the judicial definition of legislative duties which explains apparently conflicting results in several cases where the Supreme Court granted immunity to an executive branch official for remarks made in a press releases about propriety of the expenditures of federal money,[4] but not to members of Congress for the similar comments.[5]

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[1] *Barr v. Matteo* 360 US 564 (1959

[2] *Harlow v. Fitzgerald* 457 US 800 (1982)

[3] *Williams v. Brooks* Appendix A; Appendix B

[4] *Barr v. Matteo* 360 US 564 (1959); *Bush v. Lucas* 598 F.2d 958 (5th Cir. 1979) aff'd on another issue, 462 US 367 (1983)

[5] *Williams v. Brooks* 945 F.2d, 1322 (5th Cir., 1991); *Chastain v. Sundquist*, 833 F. 2d 1268 (D.C. Cir. 1987) cert. denied 487 U.S. 1240 (1988); *Hutchinson v. Proxmire* 443 U.S. 111 (1979) 7, 13

Granting Brooks immunity under the pretext that he was commenting either on pending litigation or on misuse of federal funds would mean, because of the nature of matters considered by Congress, the ordinary citizen would have no remedy against defamation by a Member of Congress.

THIS CASE WAS DECIDED CORRECTLY UNDER EXISTING LAW AND DOES NOT PRESENT NEW ISSUES REQUIRING REVIEW.

I. ESTABLISHED LAW REQUIRES A DIRECT RELATIONSHIP BETWEEN THE ACTIVITY COMPLAINED OF AND THE DUTIES OF THE OFFICIAL SEEKING IMMUNITY.

The test, "outer perimeter of official's duty" takes meaning and shape only upon review of the factual circumstances of the cases in which immunity is either granted or denied. The discussion of *Barr v. Matteo*, in the introduction of *Butz v. Economou*, 438 U.S. 478 (1978) reiterates how important the scope of Barr's authority and the circumstances of the case were as factors in the decision to grant immunity.

Congressman Brooks' arguments that he is entitled to "official immunity" seems to be predicated on the notion that "official immunity" is a talisman protecting executive or judicial branch officials whenever they make statements to the press. This is not the case. In *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980) a prosecutor accompanied the police in executing a search warrant. The process was televised. One of the prosecutors said the Marerros had been arrested and that $79,000 worth of jewelry was stolen. The prosecutor was not granted absolute immunity.

Since *Barr v. Matteo* is the originating case, it may be useful to review its facts.

Barr became the acting director of the Office of Rent

Stabilization. He took office at the time the agency's activity of terminating employees, paying them for unused vacation time and then rehiring them, was being denounced on the floor of Congress and in the press. Barr issued a press release in response to press inquiries about the issue. It announced that the two agency employees he deemed responsible for this practice would be suspended and set out Barr's (self-serving) disapproval of the prior actions. Apparently Miss Matteo and her co-plaintiff had prepared a letter purporting to be from Barr which misrepresented his position the issue. *Id* at 565-566.

After a full trial, Barr was found personally liable for defaming Miss Matteo and her co-plaintiff.

The issue that makes *Barr* the originating case for many other decisions to grant immunity was whether allegations of malice destroyed immunity that was available under previous decisions. *Id* at 569. The opinions in *Barr* reveal that the Justices were highly concerned that agency officials would be deterred from speaking on matters of public concern if they had individual liability for their statements and, therefore granted immunity.

In *Lynch v. Johnson*, 420 F.2d 818, (6th Cir. 1970) the court sent a case to trial to determine if the official was acting in an official or unofficial capacity to determine if immunity should be granted.

Another case in which summary judgement was granted on the basis of absolute executive immunity was *Bush v. Lucas*, 598 F.2d 958 (5th Cir. 1979), affirmed on other grounds, 462 U.S. 367 (1983). Bush was an employee of Marshall Space Flight Center who claimed in two television interviews that he had little meaningful work to do. After Bush was interviewed for the second time, Lucas, the Center's director, was holding a press conference for the Center's birthday and was questioned about the statements made by Bush. Lucas replied,

"... such a statement has no basis in fact" and was sued for defamation by Bush.

There are cases raising claims of some type of immunity for all the various individuals performing governmental functions. The variety extends from the President to the dog catcher. The actions complained of range from the trivial to the tragic. Some cases arose in times of conflict and dissent; others reflect now discredited opinions and attitudes; others are timeless.

The following is a quick review of the factual background of several cases in which absolute immunity has been granted.

In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), former President Nixon was granted absolute immunity against claims that he had participated in a conspiracy regarding the firing of Fitzgerald, an Air Force employee who claimed he was fired because he told Congress about cost overruns. The firing was claimed to be in violation of Fitzgerald's constitutional rights. The broad scope of the President's constitutional and statutory authority was cited as the reason the act fell within the outer perimeter of his duty. [6] However, the Court held that Nixon's co-defendants were entitled to only qualified immunity, because of the nature of their duties. This would seem to indicate that even if the action complained of raises a constitutional issue, the duty of the official is a major factor in whether to grant qualified or absolute immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Dog catchers were granted immunity in *Allred v. Suarczkodf*, 573 F.2d 1146 (10th Cir. 1978), and *Kostivek v. Town of Riverhead*, 570 F. Supp 603 (E.D. N.Y. 1983). In *Allred* the dogcatcher was sued when he arrested a

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[6]The Court had already held that the President had no immunity against criminal prosecution. *U.S. v. Nixon*, 418 U.S. 683 (1974).

woman who refused to sign an agreement to appear in court on the citation for a loose dog. In Kostivek the dog catcher was sued for overnight imprisonment of a collarless dog found running loose.

An Internal Revenue Service employee was held to be immune for claims his demotion of a subordinate caused the demoted employee to commit suicide in *Palermo v. Rorex*, 806 F.2d 1266 (5th Cir.) Cert. denied 484 U.S. 819 (1987).

Gray v Bell, 712 F.2d 490 D.C. (Cir. 1983), was a suit by the former acting director of the F.B.I., L.Patrick Gray, III, against former Attorney General Griffin Bell. Gray was indicted by a federal Grand Jury for authorizing burglaries of homes of friends of suspected members of the Weathermen underground organization. Eventually, the charges were dismissed, but Gray sued Bell for malicious prosecution. The Court granted absolute immunity for all actions taken before the Grand Jury as that was advocatory prosecutorial conduct. However, qualified immunity applies for investigative conduct.

Ex parte Virginia, 100 U.S. 339 (1879) concerned a suit against a county judge who refused to include blacks on his jury lists. The Court refused to grant immunity saying that making the jury list was not a judicial act.

A weatherman was granted immunity in *Spencer v. New Orleans Levee Board*, 737 F.2d 435 (5th Cir. 1984) when he was sued individually for failure to warn of heavy rains.

The link between the action complained of and the duties of a governmental official which is required before official immunity would attach is not present in the case before the Court.

II. SPEECH AND DEBATE CLAUSE IMMUNITY IS BROAD ENOUGH TO PROTECT AREAS OF CONDUCT WHICH REQUIRE IMMUNITY.

Speech and Debate Immunity has been expanded over the centuries to protect many activities which do not come within the literal protection of Article One, Section Six of the United States Constitution.

Doe v. McMillan, 412 U.S. 306 (1973) outlines the evolution of the expansion of protection under the Speech and Debate Clause. Committee meetings come within its scope. State Legislatures come within its scope. Congressional aides come within its scope.

However, just as there is in the jurisprudence of official immunity, there is a boundary to the protection of the Speech and Debate Clause. That boundary is according to *Gravel v. United States*, 408 U.S. 606 (1972) is determined by the relationship of the act to the legislative process:

> That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature...Insofar, as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which members participate in the committee and House proceedings with respect to other matters which the Constitution places within the jurisdiction of either House.

In *United States v. Brewster*, 408 U.S. 501 (1971), the Court is not as restrained.

> It is well known, of course, that members of the Congress engage in many activities other

> than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things "generally done in a session of the House by one of its members in relation to the business before it,..."

The issue of whether actions are political does not occur when the action is committed by an executive branch employee.

However, the fact that the Court has decided that certain activities are political, not legislative, and therefore, not protected by the Speech and Debate Clause, does not mean that the textual limitations of the Speech and Debate Clause compels such a result. If previous Courts had felt so constrained, only words spoken by members of Congress on the floor of Congress would be protected.

CONCLUSION

The opinion in *Chastain v. Sundquist,* 833 F.2d 311 (D.C. Cir. 1987), is an admirable review of the legal issues and policy considerations involved in immunity issues. Unlike *Chastain v. Sundquist,* the case before us does not involve communication with an official in the Executive Branch.

After the D. C. Circuit declined to grant *en banc* review of its decision in *Chastain v. Sundquist*, the House of Representatives passed a resolution requesting this Honorable Court to review this question, by a vote of 413 to 0.

This is more harmony than members of Congress demonstrate on most issues, and certainly on issues regarding public access to their business. However, in view of Congress' ongoing exclusion of itself from the requirements of the freedom of information act, it appears that its statement of commitment to public access to information about its activities is duplicitous.

The essential concept in all immunity cases is expressed perfectly by *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983).

> absolute immunity is only available if the claim is based on performance of a governmental function so sensitive as to warrant complete freedom from suit. Over the past decade the Court has sought to delimit the doctrine by identifying certain functionally discreet areas of official conduct characterized by their unique importance or constitutional status that deserve absolute immunity from suit for violations of federal law.

The case before us presents no such issues.

APPENDIX A

In the United States District Court for the Southern District of Texas, Houston Division

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CIVIL ACTION NO. H-88-1632

W. DOUGLAS WILLIAMS, INDIVIDUALLY, AND DOING BUSINESS AS TEXAS DYNAMICS, INC., PLAINTIFF,

v.

THE HONORABLE JACK BROOKS, DEFENDANT.

ORDER

Pending before this Court is Defendant Honorable Jack Brooks' ("Brooks") Motion to Dismiss (Document #7).

Having considered said motion, the submissions of the parties, the arguments of counsel in open court on February 13, 1989, and the applicable law, the Court concludes that Defendant Brooks' Motion to Dismiss should be, and hereby is, DENIED.

DISMISSAL

Dismissal is proper only where it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Furthermore, in the context of dismissal based on an invocation of offi-

cial immunity by Defendant Brooks, a determination that Defendant cannot claim absolute immunity is sufficient to deny Defendant's Motion to Dismiss. *See Davis v. Passman*, 544 F.2d 865, 882 (5th Cir. 1977), *rev'd en banc on other grounds*, 571 F.2d 793 (1978), *rev'd*, 442 U.S. 228 (1979). Defendant Brooks has stipulated for purposes of this motion that the facts as pleaded by Plaintiff are true.

OFFICIAL IMMUNITY

The United States Constitution grants absolute immunity to Members of Congress with respect to any speech, debate, vote, report, or action done in session under the Speech or Debate Clause. U.S. Const. art. I, § 6. *See Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974). In addition, there is a judicially created absolute immunity which protects a federal official from claims based upon statements or actions within the "outer perimeter" of his line of duty as a federal official. *Barr v. Mateo*, 360 U.S. 564, 575 (1959) (judicially created official immunity applies to executive officials). As it applies to legislative officials, however, absolute official immunity merely fulfills the mandate of the Speech or Debate Clause. *See Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 134-35 (5th Cir. 1986). In practice, the scope of protection of legislative official immunity is equivalent to that of the Speech or Debate Clause. *See Doe v. McMillan*, 412 U.S. 306, 324 (1973) (inquiry into Speech or Debate Clause immunity and legislative official immunity is the same). Thus, the determination that either one is inapplicable means that a legislator's actions or statements are not absolutely immue.

Like the Speech or Debate Clause, absolute immunity extends to legislators only when they are legislating. *Passman*, 544 F.2d at 881. The Speech or Debate Clause does not insulate legislators "who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function." *McMillan*, 412 U.S. at 315-16. Newsletters and press releases are primarily means of informing those outside the legislative forum and are accordingly not entitled to the protection

of legislative immunity. *See Hutchinson v. Proxmire*, 443 U.S. 111, 132-33 (1979) (court is "unable to discern any conscious choice to grant immunity for defamatory statements scattered far and wide by mail, press, and the *electronic media*") (emphasis supplied).

The alleged defamatory statements of Defendant Brooks were made in his government office in Washington and in his capacity as a federal official, but the act of giving an interview to members of the media in his official capacity does not thereby automatically characterize his act as legislative in nature. *See Gravel v. United States*, 408 U.S. 606, 625 (1972) (private publication not essential to deliberations in Congress). For Defendant Brooks' statements to be protected, they must be an "integral part of the deliberative and communicative process, by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* At the time of Congressman Brooks' February 24, 1987, interview, however, there was no legislative action regarding the Battleship Texas pending before the House of Representatives. *See Summary of Facts*, Plaintiff's Supplemental Response to the Defendant's Motion to Dismiss. When acting outside the scope of his legislative duties, a member of Congress is not entitled to absolute immunity from civil liability for defamatory statements. *Chastain v. Sundquist*, 833 F.2d 311, 323 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

Under the standards articulated by the United States Supreme Court and noted herein, the statements made by Congressman Brooks during his interview with the reporter from KTRK television are not within the legislative sphere protected by absolute immunity. According, there is sufficient cause to deny Defendant Brooks' Motion to Dismiss. *See Passman*, 544 F.2d at 882. It is therefore

ORDERED that Defendant's Motion to Dismiss be hereby DENIED.

SIGNED at Houston, Texas, on this 16 day of March, 1990.

DAVID HITTNER,
United States District Judge.

APPENDIX B

W. DOUGLAS WILLIAMS, PLAINTIFF-APPELLEE,

v.

HONORABLE JACK BROOKS, DEFENDANT-APPELLANT.

No. 90-2406.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Oct. 31, 1991.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

The sole issue in this interlocutory appeal is whether defendant-appellant The Honorable Jack Brooks (Congressman Brooks), as a Member of Congress, is absolutely immune under the doctrine of official immunity from a claim for defamation brought by a private citizen for comments made in a television interview. We hold that he is not, and we therefore affirm the district court's denial of his claim of official immunity.

FACTS AND PROCEEDINGS BELOW

In 1983, the State of Texas established the Battleship Texas Advisory Board (Board) to promote the restoration of the Battleship Texas. The Board sought private donations to fund the restoration. The plaintiff-appellee, W. Douglas Williams (Williams), works as a fund raiser in political affairs, both individually and through Texas Dynamics, Inc., a corporation of which he is the sole shareholder. Williams contracted with the Board to raise money for the restoration of the battleship.

In addition to the solicitation of private donations, those interested in the restoration effort sought public funds. Their efforts were successful; on October 30, 1986, Congress enacted the Continuing Appropriations for Fiscal Year 1987. In part of this continuing resolution providing for defense appropriations, the law made $5,080,000 available for a grant to the Board. After the appropriations bill was passed, but before funds were disbursed under the grant, the Board terminated Williams' contract. Williams contended that his contract entitled him to compensation equivalent to ten percent of the federal appropriation. A controversy developed over the compensation to be paid by the Board to Williams.

During the course of the controversy, in January 1987, Congressman Brooks wrote a letter to Secretary of the Navy John F. Lehman regarding the federal appropriation. The letter referred to Williams' claim for a share of the federal funds and stated that, in Congressman Brooks' opinion, it would "be against public policy—and possibly illegal as well—for Federal funds to be diverted to such use." Congressman Brooks requested a delay in administrative action before any disbursement of funds. A copy of the letter was sent to Williams, whose counsel sent his own letter in response. Secretary Lehman agreed that the appropriated sums should not be used for fund raising, and the grant was withdrawn until the issue could be resolved.

The allegedly defamatory statements were made by Congressman Brooks in a television interview at his Washington government office. Williams' complaint alleges that:

> "[O]n or about February 14, 1987, the Defendant, Jack Brooks, was interviewed in his Washington office by a representative of KTRK television, also known as channel 13, which is located in Houston, Texas, and said interview related to the controversy which has arisen in connection with the restoration of the Battleship Texas. During said interview, which was videotaped or otherwise recorded by

> agents of KTRK television, the Defendant spoke the following words of and concerning the Plaintiffs which in the context of said interview could only be understood to refer to Plaintiff Williams and his corporation. In this regard, Defendant Brooks stated that Plaintiff Williams was 'an ordinary hustler' and/or 'a small-time hustler.' Defendant Brooks further stated that Plaintiff Williams' conduct was 'illegal and immoral' and that 'five and ten percenters' such as Plaintiff Williams 'were put in jail under Eisenhower and that's where they ought to put them.' "[1]

Congressman Brooks contends that his position on the controversy regarding remuneration for Williams was being enacted into law at the time his statement was made to KTRK. Williams disagrees, and the trial court's order states that there was no legislative action pending at the time Congressman Brooks was interviewed. In any event, on March 5, the week after the KTRK broadcast, the House Subcommittee on Defense, with jurisdiction over the Battleship Texas grant, had a meeting regarding the fiscal year 1987 supplemental appropriations. On March 25, the House Appropriations Committee reported the Supplemental Appropriations Bill for Fiscal 1987 to the House. The bill contained language clarifying that the monies appropriated for the Battleship Texas were to be used only for restoration and not for remuneration of fund-raising activities. The supplemental appropriations bill was signed into law on July 11, 1987, with the added provision that the grant would be made to the Texas Parks and Wildlife Department instead of the Board.

[1] On February 22, 1988, Williams filed suit against Congressman Brooks in state court, alleging defamation based on Congressman Brooks' statements in the televi-

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[1] According to the brief of Congressman Brooks in this Court, he was actually referring to the 1949 War Assets Administration lobbying scandal, during the Truman presidency.

sion interview. The case was removed to federal court pursuant to 28 U.S.C. § 1442(a)(1) and (4).[2] On June 9,

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[2] Williams did not contest the removal below and does not contest it here. Nonetheless, because it is doubtful whether the federal district court would have had jurisdiction of the case had it been filed in that court, it would appear that the question of removal has not been waived by Williams. *See Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 1346-48, 31 L.Ed.2d 612 (1972); *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 117-18 (5th Cir. 1987) (en banc). 28 U.S.C. § 1442(a) provides in pertinent part:

"A civil action ... commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office. ...

"(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House."

Removal jurisdiction would appear not to lie under section 1442(a)(4), as Congressman Brooks was not acting "under an order of" the House of Representatives. Such removal is proper under section 1442(a)(1), however, as a congressman is an "officer of the United States" within the meaning of that subsection. *Hill Parents Ass'n v. Giaimo*, 287 F.Supp. 98, 99-100 (D.Conn.1968) (Timbers, J.) (Member of Congress; libel); *Preston v. Edmondson*, 263 F.Supp. 370, 372 (N.D.Okla.1967) (same). *See also Richards v. Harper*, 864 F.2d 85, 86 (9th Cir.1988) (Member of Congress is an officer of the United States within section 1442(a)(1)). As *Giaimo* and *Edmonson* reflect, the "color of ... office" requirement has been broadly construed in cases involving a similar context. *See also Lepucki v. Van Wormer*, 765 F.2d 86, 88-89 (7th Cir.), *cert. denied*, 474 U.S. 827, 106 S.Ct. 86, 88 L.Ed.2d 71 (1985) (libel properly removed under section 1442(a)(1)); *Stein-Sapir v. Birdsell*, 673 F.2d 165 (6th Cir.1982) (same; libel and slander); *Poss v. Lieberman*, 299 F.2d 358, 359 (2d Cir.), *cert. denied*, 370 U.S. 944, 82 S.Ct. 1585, 8 L.Ed.2d 810 (1962) (same; libel); *Malone v. Longo*, 463 F.Supp. 139, 141-42 (E.D.N.Y.1979) (same; libel and slander); *Abrams v. Playle*, 414 F.Supp. 634, 636 (D.Guam 1976) (same; slander). While section 1442(a)(1) implicitly contains the related requirement of assertion of a colorable federal defense, *Mesa v. California*, 489 U.S. 121, 109 S.Ct. 959, 966, 103 L.Ed.2d 99 (1989), this is met in the instant case by Congressman Brooks' assertion of immunity. *See, e.g. Poss*, 299 F.2d at 359, and the other libel or slander cases cited above. We further observe that section 1442(a)(1) does not require that the case be one that could have initially been filed in federal court. *See IMFC Professional*

Continued

1988, Congressman Brooks moved to dismiss the suit, claiming that he is entitled to official immunity under federal law. After briefing and oral argument, the district court in March 1990 denied the motion, and Congressman Brooks then perfected this pretrial appeal.

DISCUSSION

[2] Although the denial of a motion to dismiss is not a final judgment appealable under 28 U.S.C. § 1291, the denial of the instant motion, which raises a colorable claim of immunity, is appealable under the collateral order exception to the finality requirement of section 1291. *See Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 2449, 61 L.Ed.2d 30 (1979) (Speech or Debate Clause immunity); *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 2697, 73 L.Ed.2d 349 (1982) (presidential absolute immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 2814–15, 86 L.Ed.2d 411 (1985) (qualified immunity); *Williams v. Collins*, 728 F.2d 721, 724–26 (5th Cir. 1984) (absolute immunity under *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959)).

The district court's denial of a motion to dismiss on immunity grounds presents a question of law, reviewable *de novo*. *Walter v. Torres*, 917 F.2d 1379, 1383 (5th Cir. 1990).

The district court held that official immunity for federal legislators is coextensive with their protection under the Speech or Debate Clause. Congressman Brooks argues that congressmen are entitled to official immunity from suits for common law torts even when immunity would not be available under the Speech or Debate Clause.[3]

Services of Florida, Inc. v. Latin American Home Health, Inc., 676 F.2d 152, 156 (5th Cir.1982). *See also Christensen v. Ward*, 916 F.2d 1462, 1483 (10th Cir. 1990); *State of Florida v. Cohen*, 887 F.2d 1451, 1454 (11th Cir.1989); *Greenspun v. Schlindwein*, 574 F.Supp. 1038, 1041 (E.D.Pa.1983).

[3] Congressman Brooks' motion to dismiss was based solely on official immunity under federal law. However, on February 14, 1989, he filed a "Supplemental Brief With Respect to Recent Statutory Enactment,"

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calling attention to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRA), Public Law 100–694, which was signed into law November 18, 1988. This supplemental brief pointed out that FELRA amended the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671–80, and (1) extended FTCA coverage to the judicial and legislative branches, 28 U.S.C. § 2671; (2) provided that the FTCA would be the exclusive remedy for personal injury (and other) claims arising from the negligent or wrongful act or omission of a governmental employee acting within the scope of his office or employment (except for constitutional and certain statutory claims), 28 U.S.C. § 2679(b); (3) provided that upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time, the suit would be deemed one against the United States and it would be substituted as the party defendant, 28 U.S.C. § 2679(d); and (4) was applicable to cases pending as of the date of its enactment. Public Law 100–694 § 8(b) (set out as note under 28 U.S.C. § 2679).

The supplemental brief further noted that "discussions" had been initiated with the Department of Justice "with respect to the appropriate certification process to be followed in instances in which, like here, the federal official or employee is not part of the Executive Branch," and suggested that it would be appropriate to postpone oral argument on the motion to dismiss, which was then set for February 27, 1989, "[i]n order to permit such discussions to proceed." Alternatively, it was suggested that the court might want to hear argument on the immunity issue "and, if the case is not dismissed at that point, to set a schedule for briefing and decision of the statutory issue." In a February 23, 1989 response to this supplemental brief, Williams asked for additional time to brief the FELRA-FTCA issue. The district court then reset oral argument on the motion to dismiss for July 10, 1989.

At the July 10, 1989 hearing, Congressman Brooks' counsel informed the court that "[t]here has not been progress" in working out the certification matter with the Department of Justice, "so we have not been in the position to move to dismiss under the Federal Tort Claims Act and we are not raising that as a ground of dismissal." The district court's opinion denying the motion to dismiss did not advert to the FTCA or FELRA, and neither of the parties has adverted to it in the present appeal. Consequently, we express no opinion regarding it.

The record contains no indication that the Attorney General has made the scope of office or employment certification provided for in section 2679(d). Under section 2679(d)(3), if the Attorney General refuses to make such certification "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment" and if the court

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Speech or Debate Clause Immunity

The Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." The clause has been interpreted to protect only "purely legislative activities." *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 2537, 33 L.Ed.2d 507 (1972) ("'news letters' to constituents, news releases, and speeches delivered outside the Congress . . . are political in nature rather than legislative"). In *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), the plaintiff sued a member of Congress for making allegedly defamatory statements in a widely distributed press release. The Supreme Court held that the Speech or Debate Clause did not protect the issuance of the press release because "the transmittal of . . . information by individual Members in order to inform the public . . . is not a part of the legislative function or the deliberations that make up the legislative process." 99 S.Ct. at 2687. Congressman Brooks concedes that controlling Supreme Court precedent precludes a defense of Speech or Debate Clause immunity to this lawsuit.

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so certifies the action shall then become one against the United States and it shall be substituted as the party defendant (no such petition or certification is reflected in the record here). Upon substitution of the United States, the suit proceeds as other suits under the FTCA "subject to the limitations and exceptions applicable to those actions," section 2679(d)(4), and, among other things, "the United States shall be entitled to assert any defense based upon judicial or legislative immunity which would otherwise have been available to the employee . . . as well as any other defenses to which the United States is entitled." 28 U.S.C. § 2674. Under 28 U.S.C. § 2680(h) the provisions of the FTCA "shall not apply to— . . . (h) Any claim arising out of . . . libel, slander. . . ." However, in *United States v. Smith*, —— U.S. ——, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991), a suit against a governmental employee for course of employment negligence where the injury arose in a foreign country and was hence exempted from the FTCA by section 2680(k), the Court held that the FELRA nevertheless authorized substitution of the United States as the sole defendant, and subsequent dismissal of the suit on the basis of section 2680(k).

Official Immunity

[3] The judicially-created doctrine of official immunity protects federal officials from civil suits arising out of actions taken in the performance of their official duties and responsibilities. In *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), the Supreme Court held that the acting director of the Office of Rent Stabilization was immune from a defamation action because his press statements were "within the outer perimeter of [his] line of duty." 79 S.Ct. at 1341. The Court reasoned that

> "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of th[eir] duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.* at 1339.

[4] Although the doctrine of official immunity provides only a qualified immunity where constitutional torts are alleged, *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982), it provides "absolute immunity from suits [for torts] at common law." *Id.* 102 S.Ct. at 2732-33; *Claus v. Gyorkey*, 674 F.2d 427, 431 (5th Cir. 1982) ("Absent an allegation of a tort of constitutional magnitude, federal officials are entitled to absolute immunity for ordinary torts committed within the scope of their jobs").

[5, 6] A variety of federal and local officials are protected by the doctrine of official immunity.[4] Relying primari-

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[4] *E.g., Harlow*, 102 S.Ct. at 2732 (senior Presidential advisors); *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301 (5th Cir.1987), *cert. denied sub nom. Wolin v. United States*, 484 U.S. 1065, 108 S.Ct. 1026, 98 L.Ed.2d 990 (1988) (Food & Drug Administration employee); *Williamson v. United States Dep't of Agriculture*, 815 F.2d 368 (5th Cir.1987) (Farmers Home Administration officials); *Palermo v. Rorex*, 806 F.2d 1266 (5th Cir.), *cert. denied*, 484 U.S. 819, 108

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ly upon *Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973), and *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 134-135 (5th Cir.1986), the district court held that in the case of legislative officials, "absolute official immunity merely fulfills the mandate of the Speech or Debate Clause," and, "[i]n practice, the scope of protection of legislative official immunity is equivalent to that of the Speech or Debate Clause." We agree with the district court's reading of these precedents.

In *McMillan*, the parents of District of Columbia school children sought damages and declaratory and injunctive relief for invasion of privacy that they claimed resulted from public dissemination of a congressional committee report assessing the state of the District of Columbia school system. The report included copies of failing test papers, lists of absences, and documents relating to disciplinary problems, in each instance identifying the students involved by name. The defendants included the members of the committee, the committee staff, the Superintendent of Documents, and the Public Printer. The district court dismissed the action against the individual defendants on the ground that the conduct complained of was absolutely privileged. A divided panel of the District of Columbia Circuit affirmed, concluding that these defendants were immune from the liability asserted against them because of the Speech or Debate Clause and the doctrine of official immunity as recognized in *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959).

S.Ct. 77, 98 L.Ed.2d 40 (1987) (IRS agent); *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 135 (5th Cir.1986) (school board members; "[w]hen an official possessing legislative responsibilities engages in official activities," he has the *qualified* immunity "grounded in good faith that is bestowed upon other government officials"); *Williams v. Collins*, 728 F.2d 721 (5th Cir.1984) (Army Corps of Engineers investigators); *Allred v. Svarczkopf*, 573 F.2d 1146 (10th Cir.1978) (dog catcher); *Jones v. Diamond*, 519 F.2d 1090, 1100-01 (5th Cir. 1975) (county board members).

The Supreme Court agreed that the claims against the congressmen and the committee staff were barred under the Speech or Debate Clause. Introducing material at committee hearings, referring the report to the Speaker of the House, and voting for publication of the report were "legislative acts," and, as such, were immune from suit. The Court explained that "a public report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries." 93 S.Ct. at 2024. The Court declined to examine the appropriateness or usefulness of the information that was published.

The Supreme Court went on to note, however, that "everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause." 93 S.Ct. at 2025. As the Court explained:

> " '[T]he Clause has not been extended beyond the legislative sphere,' and '[l]egislative acts are not all-encompassing.' *Gravel v. United States* [408 U.S. 606] 92 S.Ct. 2614, 2627 [33 L.Ed.2d 583] (1972). Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity.' *Id; United States v. Johnson* [383 U.S. 169] 86 S.Ct. 749 [15 L.Ed.2d 681] (1966). Nor does the Speech or Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process. *Gravel v. United States, supra.*" 93 S.Ct. at 2025 (citation form modified).

With respect to the claims of the Public Printer and the Superintendent of Documents for immunity under the Speech or Debate Clause, the Supreme Court framed the question as follows: "[W]hether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of in-

dividuals." 93 S.Ct. at 2025. The Court answered the question in the negative:

> "A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process 'by which members participate in committee and House proceedings.' By the same token, others, such as the Superintendent of Documents or the Public Printer or legislative personnel, who participate in distribution of actionable material beyond the reasonable bounds of the legislative task, enjoy no Speech or Debate Clause immunity." *Id.* at 2025–26 (citation and footnote omitted).

The Court continued: "Thus, we cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be." *Id.* at 2026.

The Supreme Court reached precisely the same conclusion with respect to the official immunity doctrine. The Court explained its resolution as follows:

> "We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. *The scope of the inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same.* The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the 'sphere of legitimate legislative activity,' they enjoy no special immunity *from local*

> *laws* protecting the good name or the reputation of the ordinary citizen." *Id.* at 2030 (emphasis added and citations omitted).

Although the Court's opinion in *McMillan* appears to us to foreclose Congressman Brooks' official immunity argument, we will proceed to discuss some of the other arguments and authorities raised by the parties.[5]

Congressman Brooks points out that on remand in *McMillan*, the D.C. Circuit held that the Public Printer and the Superintendent of Documents were entitled to "a qualified immunity for their official acts, even though they may exceed the protection of the absolute Speech or Debate Clause immunity." *Doe v. McMillan*, 566 F.2d 713, 719 (D.C.Cir.1977), *cert. denied*, 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 59 (1978). The D.C. Circuit allowed qualified immunity because those defendants had acted in good faith and "pursuant to statutory direction or congressional orders that they could have reasonably believed were valid." *Id.* This is not true in the case *sub judice*, and in any event, Congressman Brooks has not sought to invoke qualified immunity, and we have no occasion to, and do not, make any determination as to whether or not it is available.[6]

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[5] We recognize that the concurring opinion of Justice Douglas in *McMillan* appears to afford greater protection to members of the legislative branch under official immunity and the Speech or Debate Clause than does Justice White's opinion for the Court, and that it perhaps arguably reads the Court's opinion differently than we do. Nonetheless, because Justice White's opinion attracted a majority of the Court and Justice Douglas' opinion only three votes, we are bound by the majority opinion notwithstanding the fact that Justice Douglas and the two other justices who joined his opinion also joined the Court's opinion, which otherwise would not have commanded a majority of the Court.

[6] Congressman Brooks also relies on the statement in a footnote in *McMillan* that "[b]oth before and after *Barr*, official immunity has been held applicable to officials of the Legislative Branch." *Id.* 93 S.Ct. at 2028 n. 13. We do not hold that official immunity is not applicable to Congressmen, but we merely hold that the scope of its protection is coextensive with that of the Speech or Debate Clause.

Moreover, the result in *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), appears inconsistent with finding absolute immunity for Congressman Brooks here. *Proxmire* was a state law defamation suit, and the Supreme Court in substance concluded that federal law did not provide absolute immunity to Senator Proxmire. While the *Proxmire* Court explicitly addressed only the Speech or Debate Clause,[7] and not *Barr v. Matteo* official immunity, it seems most unlikely that it would have reversed the judgments below in favor of Senator Proxmire had official immunity been available. Certainly the facts in *Proxmire* were as favorable to a claim of official immunity as are those here. The failure to discuss that theory in *Proxmire* is likely explainable by the fact that the Court there explicitly held the complained of publications beyond the scope of the protection of the Speech or Debate Clause, and had already held in *McMillan* that in the defamations context official immunity of members of Congress was no broader than that afforded by the Speech or Debate Clause.

Congressman Brooks further contends that this Circuit has recognized that official immunity also covers congressmen. He cites the following language from *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *reh'g en banc granted and opinion vacated*, 553 F.2d 506 (1977) *rev'd on other grounds*, 571 F.2d 793 (1978) (en banc), *rev'd*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), an action against United States Congressman Passman, alleging that he violated the Fifth Amendment by discharging a female staff member because of her sex: "The inapplicability of Speech or Debate protection does not foreclose [a] Representative [ ] from asserting the same qualified immunity available to other government officials." *Id.* at 881 (cita-

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[7] The Court also rejected the claim that the plaintiff was any kind of a public figure, with the result that Senator Proxmire was not entitled to the protection of the "actual malice" rule of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

tions and footnote omitted). However, the original panel opinion in *Passman* went on to state:

> *"The inapplicability of speech or debate protection does, however, foreclose Representative Passman from asserting an absolute official immunity.* . . . Speech or Debate protection is coextensive with *the need* to afford members of Congress absolute immunity. Absolute immunity extends only to certain key government officials, and then only when they are governing. It extends to prosecutors when they are prosecuting, to judges when they are judging, and to legislators when they are legislating. As indicated, however, legislators are not legislating when they dismiss staff members. For the same reasons that the speech or debate clause does not extend to staff dismissals, Representative Passman cannot invoke absolute immunity." 544 F.2d at 881 (citations omitted) (emphasis added).

In any event, because the panel opinion in *Passman* was vacated on the granting of rehearing en banc and the immunity question was never addressed by the en banc court or by the Supreme Court, it is not binding.

Congressman Brooks states that the courts of other circuits have routinely applied the doctrine of official immunity to legislators. Nonetheless, only two of the cases cited specifically held that congressmen are entitled to official immunity from suits for common law torts. *See Adams v. American Bar Ass'n*, 400 F.Supp. 219, 226 (E.D.Pa. 1975) (cabinet officers, congressmen, and other federal officials entitled to *Barr* official immunity); *Dunlap v. Wahlstrom*, Civ. Action No. 82-184 (E.D.Ky. July 6, 1983) *aff'd*, 738 F.2d 438 (6th Cir.1984) (unpublished) (congressman and caseworker entitled to official immunity). The other cited cases involve either local officials, qualified immunity, or Speech or Debate Clause immunity.[8]

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[8] One of the cases cited by Congressman Brooks indicates that official immunity affords no greater protection to legislators than the Speech or Debate Clause. *Benford v. American Broadcasting Cos., Inc.*,

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A case directly on point and discussed extensively by the parties is *Chastain* v. *Sundquist*. 833 F.2d 311 (D.C.Cir. 1987), *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 946 (1988). In that case, the panel majority concluded that "members of Congress . . . cannot claim immunity from defamatory statements unprotected by the Speech or Debate Clause." 833 F.2d at 316. The majority and dissenting opinions in *Sundquist* contain a very thorough discussion of the policy considerations, as well as the law, on this issue.

Congressman Brooks would distinguish *Sundquist* on the ground that it dealt with a legislator who spoke to the press about a dispute between a local legal aid society and a local juvenile court, which was not the subject of federal legislation, in contrast to his statements about Williams' claim for a commission, which pertained to an issue arising from recently enacted appropriations, and about which the House was developing further legislation. Congressman Brooks also contends that *Sundquist* was incorrectly decided because: (1) the panel majority misread the Supreme Court cases, relying on irrelevant Speech or Debate Clause discussions; and (2) *Sundquist* does not explain why the *Barr* rationale—that if officials do not receive official immunity, they would hesitate to give public statements in their official capacities—would be any less true for legislative than for executive officials. Congressman Brooks also points out that, on May 12, 1988, the House of Representatives, by a vote of 413–0, adopted a resolution condemning the *Sundquist* decision "because of its impact on the necessary and proper functioning of the House of Representatives as a coordinate branch of government and as the elected representatives of the American people." H.R.Res. 446, 100th Cong., 2d Sess. Finally, he contends that *Sundquist's* conclusion

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502 F.Supp. 1148, 1158 (D.Md. 1980) ("Absolute official immunity, when applied to the legislative branch, is at most coextensive with the absolute protection afforded by the Speech or Debate Clause").

that congressmen are limited to Speech or Debate immunity under the Constitution

> "produces the self-contradicting result that the officials whom the Constitution most explicitly protects—Members of Congress—receive the least immunity precisely because of that explicit protection, while other Branches—given no textual protection from lawsuit—receive the most immunity."

At least some of these arguments, particularly the latter and that concerning the *Barr* rationale, are not without considerable force. Nonetheless, we ultimately conclude that *Sundquist* properly resolved the immunity question in that case and is not distinguishable from the case before us. To hold that any statements conceivably within the "informing function" of members of Congress are absolutely immune from suit for defamation would almost wholly exempt senators and representatives from state defamation laws, and arguably in that respect expand the Speech or Debate Clause. We are in any event powerless under *McMillan* to expand official absolute immunity as Congressman Brooks requests. We also observe that members of the legislative branch, unlike members of the other coordinate branches of the federal government, have the unique power to pass a law giving themselves immunity from suit. Accordingly, it may be appropriate that any grant to them of more expansive absolute immunity than that already written into the Constitution come about by legislation rather than by judicial decision.[9]

CONCLUSION

For the foregoing reasons, the judgment of the district court is

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[9] The FELRA may be such a statute (see note 3 *supra*). Whether, or in what circumstances, such a grant of immunity could constitutionally override state defamation law is perhaps another question. But if there would be any constitutional problem with such legislation, then we must also assume that judge-made federal law would be subject to essentially the same limitations.

AFFIRMED.

REAVLEY, Circuit Judge, concurring.

I am compelled by the controlling authority to concur in this opinion; but I would hold, if free to do so, that official immunity from common law defamation liability extends to members of Congress when in an official capacity they comment on current legislative issues. *See* Mikva, Circuit Judge, dissenting in *Chastain v. Sundquist*, 833 F.2d 311, 328 (D.C.Cir.1987); *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 946 (1988).

APPENDIX C.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excise shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than Two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulations of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Mile square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings; - And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.